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1333

United States Circuit Court
of Appeals 1333
For the Ninth Circuit

No. 3952

GREAT NORTHERN RAILWAY COMPANY, a
CORPORATION, and BELLINGHAM BAY IM-
PROVEMENT COMPANY a CORPORATION,
Appellants

VS.

ALBERT R. McPHEE and FRANCES McPHEE,
Appellees

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF APPELLANTS

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FEB 23 1923

F. D. MONGKTON,

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STATEMENT OF THE CASE

This suit was brought by the plaintiffs to hold the defendants as trustees of the title to the W $\frac{1}{2}$ NW $\frac{1}{4}$, and NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 12, Township

39 N., R. 6 E. W. M., Whatcom County, Washington.

The plaintiffs attached as exhibits to their second amended complaint a transcript of the proceedings of the United States Land Department in two cases—the first, a homestead application by the plaintiff, Albert R. McPhee, for the land in controversy; the second, a homestead application by John W. Thurston and contested by him with the St. Paul, Minneapolis & Manitoba Railway Company for the $E\frac{1}{2}$ $NW\frac{1}{4}$ and $NE\frac{1}{4}$ $SW\frac{1}{4}$, Section 12, Township 39 N., R. 6 E. W. M., lying immediately east of and contiguous to the McPhee homestead claim.

By the second amended complaint and the accompanying land office records it was shown that the land in controversy in the present case, while still unsurveyed, was selected by the St. Paul, Minneapolis & Manitoba Railway Company, predecessor of the Great Northern Railway Company, on May 9th, 1902, under the Act of Congress approved August 5th, 1892, 27 Stat. at L. 390, Chap. 382; that the official plat of survey was filed on February 6th, 1907; that on the 23rd of said month the Railway Company reselected the land, conforming

the description thereof to the official survey, and that patent therefor was issued to the Great Northern Railway Company on July 24th, 1919 (Defendants' Exhibit "E"). Part of the land was afterwards sold by the Great Northern Railway Company to the Bellingham Bay Improvement Company. The theory of the second amended complaint was that on May 9th, 1902, the date of the filing of the Railway Company's selection list, the land was occupied by one Dan O'Donnell, a homestead claimant, and was therefore not subject to selection, since the Act of May 9th, 1902, limited the right of selection to land as to which at the time "no right or claim had attached or been initiated" in favor of another.

The plaintiffs alleged that they had succeeded by successive transfers to the settlement rights of Dan O'Donnell and deraigned their title as follows: The land in question was settled upon by one C. C. Cole in the summer of 1901; in October, 1901, Cole transferred his rights to Daniel O'Donnell; in the spring of 1906 O'Donnell transferred his claim to John W. Thurston; in November, 1906, Thurston conveyed his claim to Peter Beebe, and in September, 1909, Beebe conveyed to the plaintiff, Albert R. McPhee (Tr. 2, 3).

It was also shown by the amended complaint and the accompanying exhibits that the adjoining land, namely the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, the E $\frac{1}{2}$ NW $\frac{1}{4}$ and the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, was patented to John W. Thurston after a contest with the defendant Railway Company as to the three forties in section 12. (Tr. 6, 114-208.)

Thurston's chain of title was as follows: In 1901 one Al Small, who was working for C. C. Cole (mentioned in the McPhee Land Office proceedings), settled on the land; in March, 1902, Small transferred his rights to Dan O'Donnell. (Later proceedings in the Thurston case developed that Small was never a claimant of the land, but that Cole, the actual claimant, hired him to do some work on a cabin.) In the fall of 1906 O'Donnell transferred his claim to Thurston, who settled there in December, 1906, and afterwards received patent (Tr. 121, 122).

It will thus be seen that the claims of Thurston and McPhee are directly in conflict with each other, in that they both claim under rights initiated by Dan O'Donnell and his predecessor Cole. It is the settlement of O'Donnell which is alleged to have exempted the land here in controversy from

selection by the defendant Railway Company. Thurston obtained patent to the adjoining 120 acres in a contest with the Railway Company by proving that the settlement and improvements of O'Donnell and Cole were on the lands claimed by Thurston. The present suit is based upon the claim of McPhee that the Land Department erred in refusing to award him the 120 acres adjoining Thurston's, upon the ground that the settlement of O'Donnell was upon the McPhee claim, and not upon the Thurston claim. The Land Department declined to so hold, saying:

"From the above facts it is apparent that McPhee's claim is based upon the proposition that the land applied for by him was excepted from the railway selection by virtue of O'Donnell's settlement. McPhee failed to show any privity with O'Donnell, or exactly what land O'Donnell claimed under this settlement. Further, the settlement of O'Donnell is the same as that asserted by Thurston as transferee from O'Donnell. Thurston's application was allowed on the basis of O'Donnell's settlement right. The petition, however, asserts that if the showing made in the affidavits submitted by McPhee is correct, the action of the department in allowing Thurston's application was erroneous and that a suit to set aside the patent issued to Thurston might be instituted. Thurs-

ton's final proof, which was substantiated by a field investigation, disclosed that he established residence in December, 1906, lived continuously upon the land with his family, cultivated about one acre and had a house, barn and other improvements valued at \$3,000.

"O'Donnell's settlement claim in any event could not exceed 160 acres. O'Donnell was not in privity with McPhee but was with Thurston. The particular 160 acres claimed by O'Donnell was asserted by Thurston to be the same tract applied for by him and was so determined by the department without objection from McPhee. McPhee purchased Beebe's relinquishment after Beebe's application had been rejected, and failed to file any protest against the allowance of Thurston's entry, final proof, or the issuance of patent thereon. He further delayed for a period of over a year since the final decision of the department against him before filing the present petition. The department, therefore, sees no reason sufficient to warrant a recall of its former ruling." (Tr. 80, 81.)

To the second amended complaint, showing the above facts, the defendants entered their motion to dismiss for want of equity, contending, among other things, that the issue determined by the Land Department as to the situs of the original O'Donnell claim was one of pure fact and therefore conclusive upon the court (Tr. 209-211). This

contention was not sustained and the motions to dismiss were overruled (Tr. 212-224).

The defendants then answered, admitting many matters of record, but denying all allegations of fraud and mistake in the selection of the land, and specifically denying that at the time of the selection the land was occupied or claimed by any adverse claimant, and alleging, on the contrary, that it was vacant and unappropriated and of the character contemplated by the Act of August 5th, 1892. The defendants also denied any error by the Land Department and pleaded the patent of the United States issued to the defendant Railway Company on July 24th, 1919, and the subsequent transfer by the Railway Company of part of the land to the Improvement Company, and by cross-complaint prayed that their own title be quieted against the claims of plaintiffs (Tr. 225, 232).

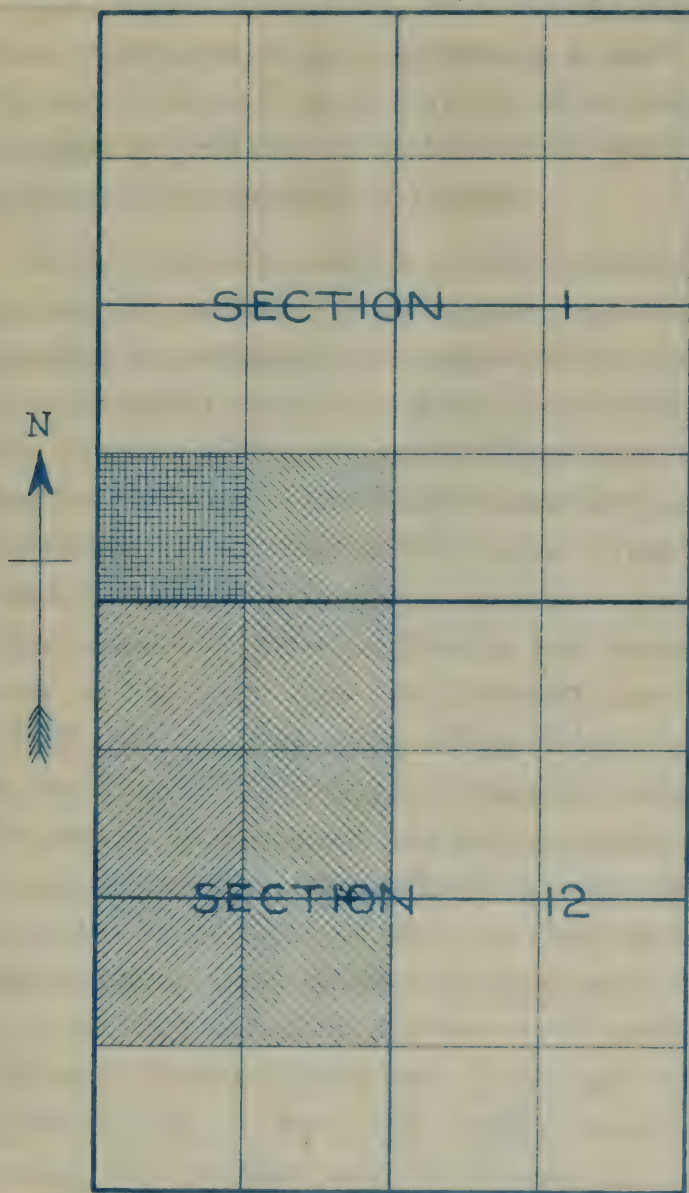
The case was tried before Judge Neterer, who held that the evidence sustained the fact "contended for in the bill of complaint," and rendered a decree for the plaintiffs (Tr. 266, 268). This appeal followed.




THE EVIDENCE IN THE LAND DEPARTMENT

Since one of the leading contentions on this appeal is that the decision of the district court is simply a review and reversal of the determination of the Land Department on a question of fact as to whether the O'Donnell claim (assuming that one was initiated) covered the land heretofore patented to Thurston or that now claimed by McPhee, it becomes necessary to set out the evidence, pro and con, relative to the acts and claims of O'Donnell and his successors. That evidence appears in full in Exhibits "A" and "B" attached to the second amended complaint (Tr. 11-208), but must be summarized and rearranged for intelligible reading. The accompanying diagram will assist the court in following the testimony:

The exhibits attached to and made a part of the second amended complaint, disclose that the decision of the United States Land Department declining to hold that the land in controversy was excepted from selection by the Railway Company by virtue of the O'Donnell settlement, was based

PART OF TOWNSHIP 39 NORTH, RANGE 6 EAST, W.M.



-  Decreed by the District Court to plaintiff Mc Phee
-  Patented to John W. Thurston
-  Patented to Peter Beebe

upon voluminous evidence presenting a clear conflict as to whether O'Donnell, when a settler, claimed the land now claimed by McPhee or the adjoining land heretofore patented to Thurston.

In the following synopsis we have placed, side by side, the evidence of the various witnesses respecting the settlement and tenure of the successive homestead claimants. Many of the witnesses for Thurston afterwards made affidavits or testified for McPhee. In the Thurston case their sworn testimony was that O'Donnell's claim covered the same land as the Thurston homestead; in the McPhee case their sworn affidavits and testimony were to the effect that not Thurston's, but McPhee's land, was that which O'Donnell had claimed at the time of the Railway Company's selection. To present to this court the evidence before the Land Department, as disclosed by the second amended complaint, and thus to show that the decision of the Land Department declining to entertain the application of McPhee to set aside the Railway Company's selection of the land was a determination of fact, will require considerable space, but in no other way can the essential nature of the Land Department's decision be presented.

EVIDENCE BEFORE LAND DEPARTMENT

SETTLEMENT OF C. C. COLE

Allegations of Second Amended Complaint.

“In the summer of 1901, one C. C. Cole was a person over twenty-one years of age, qualified to enter the public lands of the United States, and acquire title thereto under such homestead laws; and said Cole settled upon said lands and claimed the same with the intention of acquiring title as a homestead when said lands should be open to such entry.

“Said Cole erected a home, opened roads, and proceeded to improve the same until in the month of October, 1901, when he sold his improvements and right of occupancy to one Daniel O'Donnell.”
(Tr. 2.)

Affidavit of Al Small in McPhee Record.

“Al Small being first duly sworn on oath deposes and says: That he is a citizen of the United States of the age of forty-six years, and that his present post office address is Ferndale, R. F. D. No. 1,

Washington. That he has been well acquainted with the location and character of lands embraced in Section 1 and Section 12, Township 39, North of Range 6 East W. M., since the fall of 1901. That in the fall of 1901 at the request of one C. C. Cole and employed by said Cole, affiant went upon the *Southwest quarter of the Northwest quarter of Section 12*, Township 39, North of Range 6 East, and did some work and made some improvements for the said C. C. Cole and blazed and opened a trail from said land to the county road, and commenced the erection of a cabin upon said forty, which was of approximtaily the size of 12x18 feet. That affiant partly constructed said cabin, and that the said C. C. Cole occupied the same and settled upon the *West half of the Northwest quarter of Section 12, and the West half of the Southwest quarter of Section 12*, Township 39, North of Range 6 East, W. M., and claimed the same as a homestead about the first of September, 1901. That affiant knows of his own knowledge that the said C. C. Cole continued to occupy said land and claim the same as a homestead up until the month of October, 1901, on which date the said C. C. Cole sold and transferred his rights to said homestead and the improvements thereon to one Dan O'Donnell. That affiant knows that said O'Donnell immediately after the purchase of said improvements from said Cole, went upon said land and occupied the same as a homestead and completed the construction of the cabin started upon said land. That affiant was a witness for one John W. Thurston at the

time of a hearing in the United States Land Office at Seattle, at which time the said John W. Thurston was attempting to prove that there had been a prior right of homestead and settlement upon certain lands which he claimed as a homestead, said priority being for the purpose of defeating script filed by the St. Paul, Minneapolis & Manitoba Railway Company on such land. That affiant at said hearing testified that the improvements to which he testified were located upon the Southwest quarter of the Northwest quarter of Section 12, Township 39, North of Range 6 East, W. M. That affiant is well acquainted with the land upon which patent was finally issued by the United States Government to John W. Thurston, and affiant knows of his own knowledge that no improvements were ever made upon any of such lands prior to the time the same were made by said Thurston, which affiant believes to be about the year 1906. That affiant knows of his own knowledge that the improvements used by said Thurston to establish his prior right upon the land which he claimed as a homestead were the same and identical improvements as hereinbefore mentioned by affiant as being located upon the Southwest quarter of the Northwest quarter of Section 12." (Tr. 88, 89.)



Testimony of Al Small in Thurston Record.

"Q. Are you acquainted with the tract now embraced in the homestead of John W. Thurston in Section 12?*

"A. Yes sir.

"Q. How long have you been acquainted with that tract of land?

"A. Since the latter part of August, 1901. * * *

"Q. What were you doing there?

"A. Building a trail and making preparations for building a cabin.

"Q. For what purpose was you building the trail and doing the work you have just stated?

"A. I was hired to do it.

"Q. By whom?

"A. C. C. Cole. * * *

"Q. Cole was then the first settler on the land?

"A. Cole was the original locator.

"Q. And at what time did he make his settlement?

* "The homestead of John W. Thurston" was the SE $\frac{1}{4}$, SW $\frac{1}{4}$, Sec. 1, the E $\frac{1}{2}$, NW $\frac{1}{4}$ and NW $\frac{1}{4}$, SW $\frac{1}{4}$, Sec. 12, Twp. 39 N, R 6 E., W. M., and was so described in his contest with the Railway Company, at which this testimony of Small was given. (Tr. 136.)

"A. He made his settlement as near as I can remember in July, 1901.

"Q. Did he establish a residence at that time?

"A. He established a residence, but he lived on the section line north of there; he didn't live in that cabin.

"Q. Did he claim other lands in another section north?

"A. No, no other lands.

"Q. Was his residence on the section line north made with the intention of retaining this land?

"A. Yes sir.

"Q. And did he at that time suppose himself to be on this particular tract when he made his residence there?

"A. He was just stopping there while I was doing this work for him—building this cabin; just a stopping place.

"Q. Did he ever establish a residence in this cabin you built on this tract?

"A. No sir, he transferred the work I done to O'Donnell before it was completed.

"Q. Did he intend to be a settler?

"A. Yes sir.

"Q. He made these improvements for himself intending to become a settler?

"A. Yes sir, for himself.

"Q. Was it his intention to take the land as a homestead?

"A. Yes sir.

"Q. And was it for that purpose these improvements and settlement and work was done?

"A. Yes sir.

"Q. With a view to making a settlement on the land?

"A. Yes sir, a settlement." (Tr. 142-147.)

Affidavit of Dan O'Donnell in McPhee Record.

"Dan O'Donnell, being first duly sworn on oath deposes and says: That he is a citizen of the United States of the age of thirty-five years, and that his present post office address is Deming, Washington. That on or about the first of October, 1901, he purchased from one C. C. Cole all improvements and rights which the said C. C. Cole had in certain lands claimed as a homestead located near Glacier, Washington. That affiant immediately after said purchase entered into possession of said lands and improvements thereon and finished the completion of a cabin which had been started by said Cole, and did some additional work on the trail and a little clearing. That affiant transferred whatever right or interest he had in said land and the improvements thereon, to one John

W. Thurston in the spring of the year 1906. That it was the understanding of affiant that he had no rights in any land except such as he had purchased from one C. C. Cole, and that he paid the said C. C. Cole for the relinquishment of his rights and improvements the sum of One Hundred Dollars (\$100.00), and that he transferred his rights to John W. Thurston for the consideration of One Hundred Dollars (\$100.00). That it was the understanding of affiant that when he transferred his rights in land to one John W. Thurston that he transferred the same rights and the same improvements which he had theretofore purchased from said C. C. Cole. *That affiant is not acquainted with the legal description of said land according to the new survey of the same made in 1907 and is unable to state from his own knowledge the exact legal description of the land acquired by him from Cole and transferred by him to John W. Thurston.*" (Tr. 91, 92.)

Testimony of Dan O'Donnell in Thurston Record.

"Q. Where do you reside, Mr. O'Donnell?

"A. At Lawrence at present.

"Q. And what's your business?

"A. Working in the logging camps.

"Q. Where did you reside in 1901?

"A. At Maple Falls. I had charge of a mine.

“Q. Are you acquainted with the *North half of the Northwest quarter, the Southeast quarter of the Northwest quarter, and the Northeast quarter of the Southwest quarter of Section 12, Township 39 North, Range 6 East?*

(Some stress was laid by McPhee's counsel in his petition to the Secretary of the Interior for the exercise of supervisory authority on the fact that in this and similar questions asked by Thurston's attorneys of several witnesses in the Thurston contest, the land described contained, in fact, part of the land McPhee now claims, viz.: the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of section 12; and the argument was made that these witnesses might really have been testifying that the improvements of which they spoke were on McPhee's claim. However, neither in this nor any other question did the description contain the *Southwest quarter of the Northwest quarter of Section 12*, which is the forty on which McPhee and his witnesses swore the Cole and O'Donnell cabin was built. (Tr. 21, 35, 36, 38, 84, 86, 88, 91, 101.) In short, in the question just quoted, and in similar questions asked other witnesses in the Thurston contest, the only part of the McPhee claim mentioned was the Northwest quarter of the Northwest quarter of Section 12, on which no one

asserted that any improvements were ever placed; and in the same questions the witnesses were asked about three forties of the Thurston homestead, namely, the East half of the Northwest quarter and the Northeast quarter of the Southwest quarter of Section 12; consequently, in their answers the witnesses plainly referred to a settlement upon one of these three forties.)

“A. Yes, sir.

“Q. When were you first on that land, Mr. O'Donnell?

“A. When did I first go on there?

“Q. Yes?

“A. Near about—I can't give the exact date, but it was in August either the last or near about the first of September, 1901.

“Q. 1901?

“A. Yes, sir.

“Q. And what was the occasion of your presence on that land, how did you come to be there?

“A. I was looking for a homestead and I happened up that way.

“Q. Just go on and state how you acquired that homestead, if you did acquire it?

"A. It was through my father that I was informed a squatter wanted to sell his right, as you would call it, I suppose.

"Q. What was the name of the squatter?

"A. Why Mr. Cole was the name. So, I went up to see him, and I looked the claim over and I paid him one hundred dollars for the location fees. He had a trail in there and had started a cabin. (Tr. 151-152.)

Affidavit of Albert R. McPhee in McPhee Record.

[McPhee never mentioned Cole until in 1916 (p. 52), the time of his second petition to the secretary of the interior for the exercise of supervisory authority (Tr. 63-67), although his homestead application was originally rejected on September 28th, 1909 (Tr. 14), and in the meantime he had appealed to the general land office and to the secretary of the interior (Tr. 19-23); had applied to the secretary of the interior for a rehearing (Tr. 27-29); had moved for a review of the secretary's decision after rehearing (Tr. 31-32); had written Hon. W. J. Bryan, secretary of state, for "some-what of an idea of what to do" (Tr. 47-48); and had filed a first petition for the exercise of supervisory authority (pp. 48-62).]

"That in 1901 a cabin was constructed upon the southwest quarter of the northwest quarter of said section 12, by one C. C. Cole. That at the time of the construction of said cabin, all rights in and to the improvements and in and to the rights of the claimant C. C. Cole as a homesteader, for a good and valuable consideration of One Hundred Dollars, were transferred by said C. C. Cole to one Dan O'Donnell, who immediately entered into possession of said improvements, and claimed a homestead right on the following real estate:

"The west half of the northwest quarter, and the northwest quarter of the southwest quarter, of section 12, township 39, north of range 6 east W. M."
(Tr. 101.)

(McPhee does not state how he knows these things, which occurred eight years previous to his locating there.) (Tr. 15.)

Protest and Affidavit of John W. Thurston in Thurston Record.

"In the Matter of List No. 4, St. Paul, M. & M. Ry. Co., embracing the $E\frac{1}{2}$ $NW\frac{1}{4}$, $NE\frac{1}{4}$ $SW\frac{1}{4}$ Section 12, Township 39 N., Range 6 E.

"Comes now John W. Thurston, by his attorney Edward M. Comyns, and protests against the certification of the above numbered list of the above

named railway company, and the passing to patent of the land embraced therein, in so far as it includes the above described land, and asks that a hearing be ordered at which he may be permitted to establish the fact that the above described land was not on the date of its selection subject thereto, and in support of said protest and request submits the attached affidavit.

E. M. COMYNS,
Attorney for John W. Thurston.

“John W. Thurston, being first duly sworn, deposes and says: I am residing upon the above described tract of land, my postoffice address being Maple Falls, Washington. I have been acquainted with the said land for the past ten years. The land was first settled upon within my knowledge in the year 1901, by Alfred Small who built a cabin thereon and made other small improvements in the way of clearing, trails, etc., residing on and occupying the land until March, 1902, when he transferred his improvements and claim to Daniel O'Donnell.”
(Tr. 121-122.)

Testimony of John W. Thurston in Thurston Record.

“Q. You are the homestead applicant for the land that is involved in this case in section 12, Mr. Thurston?

“A. Yes, sir.

“Q. When did you first become acquainted with that land?

"A. In the fall of 1901 between July and Christmas.

"Q. And what was the condition of that land at that time?

"A. I was up looking timber over and I ran across a trail and a small improvement started as a cabin.

"Q. Do you know to whom this improvement belonged?

"A. Only by inquiring. I inquired when I came back and it was stated to me that Mr. Small had done the work.

"Q. That Mr. Small had done the work?

"A. Yes.

"Q. And was that how you came to make affidavit that those improvements were done by Mr. Small?

"A. I understood he did the work there and that he was going to take it as a homestead." (Tr. 157-158.)

Testimony of Herbert E. Leavitt in Thurston Record.

"Q. Where do you reside, Mr. Leavitt?

"A. At Maple Falls.

"Q. What is your occupation?

"A. Blacksmith and rancher.

"Q. Are you acquainted with the tract of land as embraced in Mr. Thurston's homestead application?

"A. Somewhat; yes.

"Q. When were you on that land, if at all?

"A. I have been on it twice. I was on it in 1901 and 1902.

"Q. About what part of the year 1901 were you on it?

"A. In October about the 26th or 27th; somewhere along there.

"Q. And what was the condition of that land at that time?

"A. Somebody had started a foundation for a cabin in there, that I saw when I came through there." (Tr. 154-155.)

SETTLEMENT OF DANIEL O'DONNELL

Allegations of Second Amended Complaint

"Said Cole erected a home, opened roads, and proceeded to improve the same until in the month of October, 1901, when he sold his improvements and right of occupancy to one Daniel O'Donnell, who was a citizen of the United States, and qualified to enter lands and acquire title under the homestead laws, and he, at once took possession of said

lands with the intention of acquiring title thereto, under the homestead laws, and he established a residence thereon, built houses and sheds, fenced and cleared ground, and posted notices showing the particular lands claimed by him, and continued to reside on said lands until in the spring of 1906, when for a valuable consideration he sold and conveyed his possessory rights to one Thurston." (Tr. 2.)

Allegations of McPhee in McPhee Record.

O'Donnell is not mentioned in McPhee's appeal to the commissioner of the general land office. (Tr. 15.) In that document Peter Beebe is referred to as the only "former homesteader," and it is alleged that he "located on said lands on the 16th of August, 1906." (Tr. 15.)

In the first appeal to the secretary of the interior it is alleged that "one Peter Beebe, * * * was the original successor of one Dan O'Donnell, who in September, 1896, went upon and claimed said land as a homestead." (Tr. 21-22.) Elsewhere it is always claimed that O'Donnell succeeded Cole in 1901.

J. H. Cannon, McPhee's attorney, in his brief to the secretary of the interior on the petition for

review, set out the relation of the McPhee case to the Thurston case and prayed that both records be examined in passing upon the McPhee application:

“O'Donnell * * * was occupying said land which said McPhee acquired with improvements thereon at the time, viz., May 9th, 1902, when said scrip claimant made the selection of said land hence said land was not subject to scrip location; this fact has been determined by your Honor in the case of John W. Thurston v. St. Paul, Minneapolis & Manitoba Railway Co.,” etc. (Tr. 27.)

Mr. Cannon further stated:

“That I most urgently assert that the same improvements which was taken into consideration in said cause is the same identical improvements and were then owned and held by said McPhee and are upon his land; hence *I most respectfully urge that said case be taken into consideration by this Honorable Department as a part and parcel of this McPhee case as very material.*” (Tr. 28.)

In McPhee's motion for review of the secretary's decision, it is alleged:

“That the land involved in this application is the $W\frac{1}{2}$ of the $NW\frac{1}{4}$ and the $NW\frac{1}{4}$ of the $SW\frac{1}{4}$ of Sec. 12, T. 39, N. R. 6 E. W. M., Seattle, Land District.

“That the claim of title or right to said land by McPhee is as follows: *that upon the south forty*

acres of the W¹/₂ of NW¹/₄ is the improvements of former claimants, 'Al Small' and 'Dan O'Donell,' J. W. Thurston—Peter Beebe and Final Claimant.

“That this Honorable Department did, in decision rendered by it upon March 19, 1910, in case No. ‘E-2630’ case of John W. Thurston v. St. Paul Minneapolis & Manitoba Ry. Co., hear and decide that it was shown that by corroborated affidavits that said land was occupied and improved by ‘Dan O’Donell’ upon the 9th day of May, 1902, the date of the selection by said scrip claimant and therefore not subject to scrip entry; and that a hearing was ordered, assuming the position that said O’Donell improvements was upon other land of Thurston’s adjoining this claim now in controversy; said decision being made by the Honorable First Assistant, Sec. Frank Pierce; *which said decision applicant expressly refers your Honor to. And affidavits therein and make it a part of this, his motion for review.*” (Tr. 31-32.)

In his affidavit of April 18th, 1911, supporting his motion for review of the secretary’s decision, McPhee swore:

“That said improvements (which are previously alleged to have been used and resided in by one Al Small and one Dan O’Donnell) were upon the *south forty acres of the W¹/₂ of the NW¹/₄ of Sec. 12, T. 39 N., R. 6 E.* * * * Dan O’Donnell * * * as affiant verily believes held and accept-

ed said land and resided in said residence upon May 9th, 1902, the date of the selection of the same by said scrip claimant. * * * That the accompanying photo is a true picture from the north end of said building and improvements therein erected there by said Al Small and acquired by said O'Donnell and said Thurston—and Beebe—and finally claimant. That I have measured the distance from the line upon the west side of J. W. Thurston's land and that said building and improvements is approximately 40 rods in distance from the land of said Thurston and thoroughly (?) understood was and is upon said land of claimant aforesaid—which was transferred and acquired by said Peter Beebe, my predecessor as aforesaid.

“That said land was acquired by Al Small in the year of 1901 occupied by him until the month of March, 1902, when he disposed of the same to said Dan O'Donnell he occupied the same until the fall of 1906 when said O'Donell disposed of the same to Thurston.” (Tr. 38-39.)

Evidence of Thurston in Thurston Record.

In Thurston's protest and affidavit of September 29th, 1909, in his contest with the Railway Company, “In the Matter of List No. 4, St. Paul, M. & M. Ry. Co., embracing the $E\frac{1}{2}$ $NW\frac{1}{4}$, $NE\frac{1}{4}$ $SW\frac{1}{4}$ Section 12, Township 39 N., Range 6 E.” he alleged:

"The land was first settled upon within my knowledge in the year 1901, by Alfred Small who built a cabin thereon and made other small improvements in the way of clearing, trails, etc., residing on and occupying the land until March, 1902, when he transferred his improvements and claim to Daniel O'Donnell. Daniel O'Donnell, immediately upon acquiring possession commenced his residence on this land and continuously occupied the same until the fall of the year 1906 said Daniel O'Donnell during all of said period being qualified to make homestead entry and occupying land with a view to make said entry. In October, 1906, Daniel O'Donnell conveyed to me all his right and title to this land, together with the improvements thereon. *I took up my residence on the land in December, 1906, and have lived there continuously ever since, and the improvements placed by me on said land are today reasonably worth the sum of \$2,000. I was at all times up to February 6, 1907, the date of the filing of the plat of said township 39 N., range 6 E., entirely ignorant of the fact that the St. Paul, M. & M. Railway Company was laying any claim to this land. On May 9, 1902, the date of the filing of selection by the Railway Company, the land above described was actually occupied and improved, which occupation and improvements were readily discernible by the most casual inspection.*" (Tr. 121-122.)

At the hearing of his contest, he testified:

"Q. You are the homestead applicant for the land

that is involved in this case in section 12, Mr. Thurston?

"A. Yes, sir."

This was followed by his testimony relative to the building of the cabin by Al Small, which we have quoted under the heading "Settlement of C. C. Cole" on page 22. Thurston then continued:

"Q. Now when were you there again?

"A. I was there again between January and April, 1902. There was snow on the ground.

"Q. Describe the improvements at that time.

"A. I went up the same trail and across the same section and the cabin was completed and this man O'Donnell was living there.

"Q. O'Donnell was living there?

"A. Yes.

"Q. Now how far from this land were you living at that time?

"A. About five miles; four and a half.

"Q. That was in the year 1902?

"A. Yes.

"Q. And have you lived there ever since?

"A. Yes sir.

"Q. Well between 1902 and 1906 where were you living?

"A. In 1904 I went up to Warnick, and that is just about a mile and a half from this same piece of land; it is a railroad station.

"Q. Do you know who was living on this land between the interval elapsing between the time you first saw it and 1902?

"A. Mr. O'Donnell.

"Q. What was the value of those improvements that were there in 1902, a rough estimate?

"A. Oh, I don't think a man could put them in there for less than \$200, I guess, if he would hire it done he couldn't; hire it put in there.

"Q. Then you knew the land in May 1902?

"A. Yes sir.

"Q. And was that land unoccupied vacant land at that time?

"A. Well, Mr. O'Donnell had that homestead.

"Q. Mr. O'Donnell was occupying it?

"A. He was occupying it, Yes.

"Q. When did you acquire any title to this land, any claim to it, Mr. Thurston, and by what process?

"A. I was living a mile or so down there, and I found out I had better take my homestead right and use it, and so I went to O'Donnell and I says to him, what would he take for his improvements he had got up there, and says, 'I don't know.' I says, 'If you don't sell out somebody is going to jump you on this

continued residence proposition ;' and he says, ' I know it, but it's pretty hard for me to live up there and have to work, too.' So I says, 'I will give you a hundred dollars for your improvements and go ahead with the work and make it my home, because I am going in there some place;' and he says, 'All right'; and I paid him the money and took a receipt.

"Q. When was that?

"A. The receipt shows that. I think it was March 26th, 1902.

"Q. Is that the receipt which you received from him?

"A. Yes sir.

"Q. Refreshing your memory from that receipt, what date did the transfer occur?

"A. October 22nd, 1906. I rode out there in a hurry and asked him for a receipt for my money, and he gave me that.

"Q. Now, Mr. O'Donnell was working in the vicinity of the land during all those times, was he, freighting there?

"A. Yes, freighting there, and he did most of the time." (Tr. 157-160.)

Affidavit of Dan O'Donnell in McPhee Record.

"Dan O'Donnell, being first duly sworn on oath deposes and says: That he is a citizen of the United States of the age of Thirty-five years, and that his

present Post Office address is Deming, Washington. That on or about the first of October, 1901 he purchased from one C. C. Cole all improvements and rights which the said C. C. Cole had in certain lands claimed as a homestead located near Glacier, Washington. That affiant immediately after said purchase entered into possession of said lands and improvements thereon and finished the completion of a cabin which had been started by said Cole, and did some additional work on the trail and a little clearing. That affiant transferred whatever right or interest he had in said land and the improvements thereon, to one John W. Thurston in the spring of the year 1906. That it was the understanding of affiant that he had no rights in any land except such as he had purchased from one C. C. Cole, and that he paid the said C. C. Cole for the relinquishment of his rights and improvements the sum of One Hundred Dollars (\$100.00), and that he transferred his rights to John W. Thurston for the consideration of One Hundred Dollars (\$100.00). That it was the understanding of affiant that when he transferred his rights in land to one John W. Thurston that he transferred the same rights and the same improvements which he had theretofore purchased from said C. C. Cole. *That affiant is not acquainted with the legal description of said land according to the new survey of the same made in 1907 and is unable to state from his own knowledge the exact legal description of the land acquired by him from Cole and transferred by him to John W. Thurston.*" (Tr. 91- 92.)

Testimony of Dan O'Donnell in Thurston Record.

"Q. Are you acquainted with the *North half of the Northwest quarter, the southeast quarter of the Northwest quarter, and the Northeast quarter of the Southwest quarter* of Section 12, Township 39 North, Range 6 East.

"A. Yes sir.

(The witness then testified to the purchase of Cole's improvements, as quoted on pages 18 and 19 of this brief). He then proceeded:

"Q. And what did you do then?

"A. Why I started to work on the cabin. I was back and forth; Every little spare time I could get I would go out there and do a little work. Of course, it was a little inconvenient to get in there, but I worked on the place the best I could.

"Q. When was the cabin completed?

"A. Near about in March, as near as I can judge, 1902.

"Q. And did you furnish it?

"A. I bought a little supplies and took in there; a stove and stuff I bought at Maple Falls; a bachelor's outfit.

"Q. Did you post any notices indicating what land was claimed by you?

"A. Yes sir.

"Q. And was that the same land I described to you?

"A. Yes sir.

"Q. Were you occupying that land in the month of May, 1902?

"A. Yes sir.

"Q. On May 9th, 1902.

"A. Yes sir.

"Q. The date the St. Paul, Minneapolis & Manitoba attempted this selection?

"A. Yes sir. I was on there before they ever selected. I was right on the trail between the hills there.

"Q. Then your claim had attached in May 1902?

"A. Yes sir.

"Q. And the land was in no sense unoccupied land on that date?

"A. Yes sir.

"Q. Was there anyone else claiming it outside of yourself?

"A. No sir.

"Q. Were there any cabins on any of the other forties claimed by you?

"A. No sir, I was all over the land. Me and other parties that appeared there.

"Q. What was the value of the improvements that were there on that land on the 9th day of May, 1902?

"A. Well, do you mean what it cost me for what I had in the cabin and all-

"Q. Yes, put it all together, figuring your own labor and the labor of anyone that helped you?

"A. \$150 for the cabin.

"Q. And it had cost you that up to May 1902?

"A. Yes sir.

"Q. Now you did some trail work there, didn't you?

"A. Yes.

"Q. Were these improvements readily discernible to anyone making an examination of this claim?

"A. Yes.

"Q. And was this trail that led up to your cabin the only trail on your land?

"A. The only one.

"Q. Was that the only one in May 1902?

"A. Yes sir." (Tr. 151-154.)

Affidavit of Dan O'Donnell in Thurston Record.

After the hearing in the contest between Thurston and the Railway Company, the Assistant Commissioner of the General Land Office rendered an opinion upon the Railway Company's appeal, in which he

pointed out that, although it appeared from O'Donnell's testimony that he was in possession of the Thurston homestead at the time of the Railway Company's selection, there was no evidence that O'Donnell was a "qualified settler." The Assistant Commissioner directed the Register and Receiver of the local Land Office "to call upon Thurston to file the affidavit of Mr. O'Donnell, duly corroborated by two witnesses, as to his qualifications on May 9, 1902, for consideration with the evidence in the case." Thereupon Thurston filed the following affidavit of O'Donnell:

"Dan O'Donnell being first sworn says that he is the identical Dan O'Donnell who testified in the above entitled case at the hearing had before the United States District Land Office at Seattle, Wash., on May 24, 1910. That on May 9, 1902, he was a qualified settler of the $E\frac{1}{2}$ $NW\frac{1}{4}$, $NE\frac{1}{4}$ $SW\frac{1}{4}$ Section 12, Township 39 N., Range 6 E. That on said date he possessed all the qualification requisite to make entry of said land under the homestead laws." (Tr. 181.)

Affidavit of H. E. Leavitt in McPhee Record.

"I, H. E. Leavitt first after being duly sworn say that I am a resident of Whatcom County, State of Washington. That my post-office address is Maple Falls Washington, that I have been acquainted with

the land in Sec. 12, T. 39 N. R. 6 E., and especially the *West half of the Northwest quarter* of said section, both before and after the survey of the same that I have been acquainted with said land for 10 years last past next preceding the making of this affidavit; that the accompanying photograph is a true picture of said O'Donnell cabin upon the *South forty acres of said land* taken from an expose at the north end thereof; that said cabin has been at all times upon said land since the fall of the year 1901. That in the month of April 1902 I was at said cabin and the same occupied and owned at said time by Dan O'Donnell; he had stove provisions and bed and used it as his home; that said cabin is upon the land or claim of said claimant Albert R. McPhee and said photograph contains the likeness of said McPhee and family who now reside upon said land but not in this cabin." (Tr. 35-36.)

Affidavit of H. E. Leavitt in Thurston Record.

At the foot of Thurston's affidavit, already quoted on page 28, in which Thurston swore that the settlement and claim of Dan O'Donnell, embraced the $E\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ of section 12, Leavitt made a short affidavit jointly with Herman Steiner, in which they both swore that "they have read the foregoing affidavit of John W. Thurston; that they are of their own knowledge familiar with

the facts set forth and know the same to be true.”
(Tr. 123.)

Again, when O'Donnell swore “that on May 9, 1902, he was a qualified settler of the E $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12,” Leavitt and Steiner filed affidavits corroborating him. (Tr. 182.)

Affidavit of Al Small in McPhee Record.

This affidavit has already been quoted at page 11. It was to the effect that the claims of Cole and O'Donnell embraced the W $\frac{1}{2}$ NW $\frac{1}{4}$ and W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 12, and that the cabin commenced by Cole and completed by O'Donnell was on the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12. (Tr. 88-90.)

Testimony of Al Small in Thurston Record.

“Q. Are you acquainted with the tract *now embraced in the homestead of John W. Thurston in Section 12?*

“A. Yes sir.” (Tr. 142.)

(Then follows testimony relative to his erection of the cabin for Cole, as already partially quoted on pages 13 and 14 of this synopsis.) The witness then continued:

"A. I was there on or about the 20th of November the same year. (1901.)

"Q. And what did you do on that occasion?

"A. I went up there to work for Mr. O'Donnell.

"Q. Did you do any work on the place at that time?

"A. Not at that time.

"Q. When did you again do any work, if at all?

"A. The last work I done on the claim was along about the 12th of October.

"Q. The same year?

"A. The same year.

"Q. What other work did you do then?

"A. I laid up one more log and took my tools down off the claim.

"Q. And when were you again on the claim?

"A. The last time was in February, 1902; along about February.

"Q. February 1903 or 2?

"A. 1902. * * *

"Q. And who was occupying the cabin at that time?

"A. Dan O'Donnell.

"Q. Was there anything else in the way of improvements in the month of March, 1902, except this cabin?

"A. There had been trees slashed away, trees that were in danger of falling on the cabin.

"Q. And they would cover what area?

"A. I should judge about one-half of an acre.

"Q. Was there anything additional in the way of trail work?

"A. Yes sir.

"Q. Was there a trail leading to the cabin?

"A. Yes sir, leading to the cabin from the County Road.

"Q. When were you there again, Mr. Small, if at all?

"A. Along in July right after the Fourth.

"Q. That was in July 1902?

"A. In July 1902.

"Q. Who was occupying the cabin then, if any one?

"A. O'Donnell.

"Q. And what was its condition.?

"A. Habitable.

"Q. Did the cabin bear evidence of continuous occupation between March and July, 1902?

"A. Yes sir, it bore such evidence. * * *

"Q. And what was the date he (Cole) made the sale to O'Donnell? About what time?

"A. It was some time in the latter part of August or first of September 1901.

"Q. 1901?

"A. 1901, yes.

"Q. Do you know anything about whether O'Donnell took possession of the improvements at the time of that transfer?

"A. Yes sir, he took possession.

"Q. Did he establish a residence on the land?

"A. Yes sir, he made it his stopping place.

"Q. And how long did he live there?

"A. I do not know.

"Q. Do you know anything about the transfer from him to somebody else—from O'Donnell to some other person?

"A. I know there was a transfer made to someone, but the circumstances I don't know nothing about at all.

"Q. *Do you know when the present claimant took possession of the improvements?*

"A. I don't know the exact date but I know the year.

"Q. What year?

"A. 1906." (Tr. 142-147.)

Affidavits of Fred Benson in McPhee Record.

"I, Fred Benson first after being duly sworn say that I am a native born citizen of the United States. My post office address is Glacier, Washington. That I have been acquainted with the land in Section 12, T. 39 N. R. 6 E. for the last six years last past next preceding the making of this affidavit, *as particularly the south forty of the west $\frac{3}{4}$ ($\frac{1}{2}$) of the NW $\frac{1}{4}$.* That I know of my own personal knowledge for the last five years that the Dan O'Donnell improvements was made and are upon said forty last aforesaid and upon the land claimed by said Albert R. McPhee. That I have considerable experience as a photographer and the accompanying photo is a true facsimile or representation of the building or improvements made by said 'Dan' O'Donnell as his predecessors upon said land and the same represents said claimant Albert R. McPhee and family at said cabin upon his said claim that said McPhee does not now reside in said building but has erected him an other residence upon said land. (Tr. 36, 37.)

"Fred Benson, being first duly sworn on oath says: that he is a citizen of the United States of the age of Thirty-seven years, and that his present Post office address is Glacier, Washington. That he has been well acquainted with lands in Section 12 Township 39, North of Range 6 East W. M., for eleven (11) years last past immediately preceding the making of this affidavit. That he

knows of his own personal knowledge that the improvements on the *Southwest quarter of the Northwest quarter of said section* commonly known as the Dan O'Donnell improvements are the same and identical improvements which affiant photographed during the summer of 1910 or 1911 for one John W. Thurston. That affiant knows of his own personal knowledge that said improvements are not upon any part of the land which was finally patented by the United States to said John W. Thurston. That affiant knows of his own knowledge that there were no improvements of any kind or character upon any land upon which patent was finally issued to said John W. Thurston prior to the fall of 1906.

"This affidavit is made supplemental to that affidavit of affiant dated April 18th, 1911, and now a part of the record in this proceeding." (Tr. 90, 91.)

Testimony of John R. Smith in Thurston Record.

"Q. State your full name, Mr. Smith.

"A. John R. or John Robert Smith.

"Q. Where do you reside, Mr. Smith?

"A. At Sumas, Whatcom County, this state.

"Q. What has been your occupation, Mr. Smith?

"A. I have been employed in the Forest Service department as a ranger. * * *

"A. Were you acquainted with the *North half of the Northwest quarter, the Southeast quarter of*

the Northwest quarter, and the Northeast quarter of the Southwest quarter of Section 12, Township 39 North, Range 6 East?

"A. Yes sir, I have been over the ground several times.

"Q. And when were you first there, Mr. Smith?

"A. I was first there in 1901.

"Q. In 1901?

"A. Yes sir.

"Q. And do you recollect what part of the year?

"A. It was in the summer of 1901.

"Q. You stated that you were on the land in 1901?

"A. Yes sir.

"Q. Do you recall about the time of year?

"A. In the summer season, I should judge about June.

"Q. What was the condition of the land at that time relative to improvements or lack of them?

"A. I saw no improvements.

"Q. None at all?

"A. No sir.

"Q. When were you next on the land?

"A. In the spring of 1902.

"Q. Was it prior to May 9th, 1902, or subsequent to that?

"A. It was prior; it was in March.

"Q. In March 1902?

"A. Yes.

"Q. And what did you find there in the way of improvements on that date?

"A. I saw a cabin; that is, a part of a cabin; just the body, some logs put together.

"Q. And upon what particular forty acre tract was that cabin?

"A. *The northeast of the northwest*, I think. I ain't sure about it.

"Q. And was there anything else in the way of improvements that you saw at that time?

"A. Some slashing had been done and some logs cut in front and piled up in a little pile.

"Q. Did it bear evidence of having been recently placed there, or did it appear to have been there a long while?

"A. It appeared to be new at that time?

"Q. And was it a cabin in course of construction?

"A. It was a cabin in course of construction; a log cabin.

"Q. Did you ascertain whose cabin it was, or who was doing the work?

"A. I understood at the time who it was. There was no one present at that time.

“Q. When were you there again after March 1902?

“A. Well, I was there the same month, in March 1902; I was there later and about the first of April.

“Q. And did you notice any difference in the improvements?

“A. Yes sir.

“Q. What difference did you note?

“A. The cabin was completed.

“Q. The cabin was completed?

“A. Yes sir. * * *

“Q. Do you recall what that notice contained?

“A. It contained a description of the land and the time it was settled, but I don't remember the description particularly or the date of settling.

“Q. And how was it signed? Who was it signed by?

“A. By Jack Thurston, or John Thurston.

“Q. Now I will ask you whether there was any trails leading in to the land?

“A. There was a trail.

“Q. Was that the only trail that gave access to this tract?

“A. It was to this particular part of the tract; Yes, the only trail.

"Q. Not to anyone coming in on the trail would these improvements be readily visible?

"A. They would.

"Q. It would be impossible to miss them, would it, if a person came in over that trail?

"A. No, you couldn't miss them; you couldn't pass them on that trail; no.

"Q. When were you there next after March 1902?

"A. I was there in 1903.

"Q. And were the same improvements existent at that time?

"A. Oh yes. I will tell you. I have got some things mixed here now; it has been so long ago. What name did I say was on it?

"MR. COMYNS: Thurston.

"WITNESS: It was O'Donnell. Not Thurston then.

"BY THE REGISTER: Do you wish to correct your testimony in relation to the notice? Do you wish to correct it?

"A. Yes sir.

"BY THE REGISTER: You may do so.

"A. The name was Dan O'Donnell, Mr. Thurston coming in afterwards, I have got them mixed up, being so long ago." * * * (Tr. 137-142.)

Affidavit of E. M. Magner in McPhee Record.

“That affiant knows of his own personal knowledge that at said time (September 1909) there was improvements situated on said *Southwest Quarter of the Northwest Quarter* of Section 12 consisting of a log cabin about 12 feet by 18 feet in size and a well defined trail, which showed that the same had been frequently traveled and used. That affiant states that it was generally known in the community of Glacier, Washington, that said log cabin was placed upon said 40 acre tract of land by one Al Small, and was later transferred by the said Al Small to one Dan O'Donnell, and was known in the community as the O'Donnell improvements. * * * That affiant has been well acquainted with the location and character of the Southeast Quarter of the Southwest Quarter of Section 1, and the East half of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter of Section 12, all in Township 39, North of Range 6 East W. M., for ten years last past, and that affiant knows of his own personal knowledge that there were no improvements of any kind, character or description upon any of said land last described prior to January 1st, 1906, said land last described being the land upon which patent was issued April 29th, 1913, to John W. Thurston.” (Tr. 86-88.)

Testimony of Herman Steiner in Thurston Record.

“Q. Where do you reside, Mr. Steiner?

“A. At Maple Falls.

“Q. What is your occupation?

“A. Farmer.

“Q. Are you acquainted with *that tract of land embraced in the homestead application of Mr. John Thurston located in Section 12, Townshp 39 North, Range 6 East?*

“A. Yes sir.

“Q. How long have you been acquainted with that tract of land?

“A. I have known it for about fifteen years.

“Q. Were you on that land prior to May 1902?

“A. Yes sir.

“Q. Upon what date immediately prior to that date were you on the land?

“A. I was there in the Fall of 1901, and early in the spring of 1902, February or March.

“Q. What was the condition of the land in 1901 when you visited it?

“A. There was a log cabin started.

“Q. And when were you there in 1902?

“A. Either February or March; I don't remember which.

"Q. What was the condition of the land at the time you visited it at that time?

"A. There was a cabin built on the land.

"Q. What kind of a cabin was this?

"A. A log cabin, I should judge 14 x 16, the size of it.

"Q. Built of cedar logs?

"A. Yes.

"Q. Was it furnished to any extent?

"A. Yes sir, a good stove in it, cooking utensils and a bed.

"Q. Was anyone occupying it?

"A. Yes sir.

"Q. Who?

"A. O'Donnell; Dan O'Donnell.

"Q. What was the occasion of your presence up there in February or March 1902?

"A. I helped to build the cabin. * * *

"Q. Did you take note of any notices posted on the cabin or on the land when you were there in March?

"A. Yes, there was a notice on the cabin door.

"Q. Do you remember the contents of that notice with reference to the possession of the land?

"A. That he had taken land in Section 12 as a homestead, as near as I can remember it, *giving the description of the land.*

“Q. What did the notice contain?

“A. Why that he as a citizen of the United States claimed this as a homestead.

“Q. Who was it signed by?

“A. O'Donnell and I was a witness.

“Q. Do you know who wrote that notice?

“A. I and him wrote it out together.” * * * (Tr. 148-150.)

Steiner also made affidavit to the same effect, in support of the affidavit of Thurston that Dan O'Donnell was a settler upon and claimant of *“the East half of the Northwest quarter and Northeast quarter of the Southwest quarter of Section 12, Township 39 N., R. 6 E. W. M.,”* when Thurston filed his protest against the allowance of the Railway Company's selection, which resulted finally in the issuance of patent to him. (Tr. 123.) Later he filed another affidavit, corroborating the affidavit of Dan O'Donnell himself that the latter “on May 9, 1902, was a qualified settler of the $E\frac{1}{2}$ $NW\frac{1}{4}$ $NE\frac{1}{4}$ $SW\frac{1}{4}$, Section 12. (Tr. 122.) Steiner, as stated in his testimony quoted above, was a witness upon O'Donnell's posted homestead notice, and presumably, therefore, knew what land O'Donnell claimed. He has never given any testimony or made any

affidavit contrary to his testimony and affidavit in the Thurston case.

SETTLEMENT OF JOHN W. THURSTON

Allegations of Second Amended Complaint.

“In the spring of 1906, * * * for a valuable consideration he (O'Donnell) sold and conveyed his possessory rights to one Thurston, who entered upon said lands for the purpose of acquiring title, and he was a qualified citizen and entitled to enter public lands, and he so entered this land for the purpose of acquiring title under the homestead laws and so continued in possession until in November, 1906, when he, for a valuable consideration sold and conveyed his improvements and possessory rights to said land to Peter Beebe.” (Tr. 2-3.)

Affidavit of McPhee in McPhee Record.

“Said improvements (those built by Al Small and occupied by Dan O'Donnell) were upon the *south forty acres of the W $\frac{1}{2}$ of the NW $\frac{1}{4}$ of Sec. 12, T. 39 N., R 6 E.*, and upon the land prior to my acquiring the same and held by Peter Beebe, who had held the same and acquired the same from one J. W. Thurston, the said Beebe and Thurston in so arranging their respective claims so as to come near to the County Road. Said Thurston had paid

and did pay said Beebe \$50.00 and surrendered to said Beebe possession of said $W\frac{1}{2}$ of $NW\frac{1}{4}$, said Thurston being a successor to said land from and through one Dan O'Donnell. * * *

“In the fall of 1906 * * * said O'Donnell disposed of the same to Thurston — then said Thurston at about said time as affiant believes transfered the the same to Beebe.” (Tr. 38-39.)

Affidavit of Peter Beebe in McPhee Record.

“Peter Beebe first after being duly sworn say that I am a native born citizen of the United States of the age of 54 years. My post-office address is Glacier, Washington. I have resided in Whatcom County, State of Washington, for nine years last past next preceding the making of this affidavit. That I have been acquainted with the lands in Sec. 12 T. 39 N. R. 6 E. since the 18th day of August, 1906. That I did have a homestead in said Sec. and in Sec. 1, adjoining the same. Firstly being the $S\frac{1}{2}$ of $SW\frac{1}{4}$ of Sec. 1 and the $N\frac{1}{2}$ of the $NW\frac{1}{4}$ of Sec. 12. That I held the same until on or about the month of November, 1906, at which time I entered into an agreement or exchange with J. W. Thurston whose post office address is Glacier, Wash., under the following condition that for the sum of \$50.00 paid me by said Thurston I then transferred my right of claim holding first to the $SW\frac{1}{4}$ of the $SW\frac{1}{4}$ of Sec. 1 & $W\frac{1}{2}$ of $NW\frac{1}{4}$ & $NW\frac{1}{4}$ of $SW\frac{1}{4}$ of Sec. 12 all of said land being

in T. 39—N. R. 6 E. W. M. That I made final proof upon the 40 acres in Sec. 1 on October 5, 1909. That on or about the 20th day of Sep. 1909, I released the land in Sec. 12 and sold my improvements thereon to Elbert R. McPhee for the sum of \$50.00 and he with his family has resided continuously and now resides upon said land." (Tr. 83-86.)

Affidavit of Dan O'Donnell in McPhee Record.

In this affidavit which has already been quoted in full on pages 31 and 32 of this synopsis, O'Donnell states that:

"He transferred his rights to John W. Thurston for the consideration of One Hundred Dollars (\$100.00). That it was the understanding of affiant that when he transferred his rights in land to one John W. Thurston that he transferred the same rights and the same improvements which he had theretofore purchased from said C. C. Cole. *That affiant is not acquainted with the legal description of said land according to the new survey of the same made in 1907 and is unable to state from his own knowledge the exact legal description of the land acquired by him from Cole and transferred by him to John W. Thurston.*" (Tr. 91-92.)

Evidence of John W. Thurston and Witnesses in Thurston Record.

“In the Matter of List No. 4, St. Paul, M. & M. Ry. Co., embracing the $E\frac{1}{2}$ $NW\frac{1}{4}$, $NE\frac{1}{4}$ $SW\frac{1}{4}$ Section 12, Township 39 N., Range 6 E. * * *

John W. Thurston, being first duly sworn, deposes and says: I am residing upon the above described tract of land, my post-office address being Maple Falls, Washington. I have been acquainted with the said land for the past ten years. The land was first settled upon within my knowledge in the year 1901, by Alfred Small who built a cabin thereon and made other small improvements in the way of clearing, trails, etc., residing on and occupying the land until March, 1902, when he transferred his improvements and claim to Daniel O'Donnell. Daniel O'Donnell, immediately upon acquiring possession commenced his residence on this land and continuously occupied the same until the fall of the year 1906, said Daniel O'Donnell during all of said period being qualified to make homestead entry and occupying land with a view to make said entry. In October, 1906, Daniel O'Donnell conveyed to me all his right and title to this land, together with the improvements thereon. I took up my residence on the land in December, 1906, and have lived there continuously ever since, and the improvements placed by me on said land are today reasonably worth the sum of \$2,000. I was

at all times up to February 6, 1907, the date of the filing of the plat of said township 39 N., Range 6 E., entirely ignorant of the fact that the St. Paul, M. & M. Railway Company was laying any claim to this land. On May 9, 1902, the date of the filing of selection by the Railway Company, *the land above described* was actually occupied and improved, which occupation and improvements were readily discernible by the most casual inspection." (Tr. 121-122.)

The above affidavit was corroborated by Herman Steiner and H. E. Leavitt (Tr. 123), and by Thurston and all of his witnesses in the Thurston contest. (Tr. 137-162.) Most of this testimony has already been quoted.

With one possible exception Thurston and his witnesses do not mention the transaction in which Beebe and Thurston are alleged to have re-arranged their respective homestead claims. The possible exception is the following rather obscure evidence of Thurston:

"Q. Now when did you take up your residence on the land?

"A. That same Fall; being a quarter of a mile back from there I drops one forty and takes another forty, and I takes my improvements and puts them down on another forty. I didn't want to

move my children and family up in the cabin, so I put a cabin there." (Tr. 160.)

Whatever the forty acres may have been that Thurston "dropped," he continued to claim the E $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$; and those three forties were sworn by him and all his witnesses (including O'Donnell) to be the same land claimed and occupied by O'Donnell at the time of its selection by the Railway Company, Thurston's contest with the Company involved that land, and his witnesses all swore that it was the identical land O'Donnell had settled upon and claimed on and prior to May 9, 1902.

Field Investigation in Thurston Record.

It appears by the Assistant Secretary's opinion of November 17th, 1916, that:

"The facts disclosed by the latter's (Thurston) final proof were further ascertained by means of a field investigation had by direction of the Commissioner of the General Land Office." (Tr. 111.)



SETTLEMENTS OF BEEBE AND McPHEE

As the facts with respect to Beebe and McPhee subsequent to the alleged transfer from Thurston to Beebe are not in issue, the Land Office evidence concerning them is not abstracted. Suffice it to say that "February 6, 1907, Peter Beebe filed homestead application for the SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 1, W $\frac{1}{2}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$, SW $\frac{1}{4}$, Sec. 12, which was rejected by the register and receiver as to the lands in Sec. 12 for conflict with the railway selection. Upon appeal their action was affirmed by the Commissioner in a decision dated July 28, 1909, notice of which was served upon Beebe's attorney September 21, 1909. September 23, 1909, Beebe executed a relinquishment of the W $\frac{1}{2}$ NW $\frac{1}{4}$ and NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 12, to the United States, stating therein that he has transferred 'my right and good will to E. R. McPhee.' The relinquishment which had been purchased by McPhee for the sum of \$50. was filed September 27, 1909, concurrently with his homestead application. Beebe's application was allowed as to the SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 1, August 21, 1909 (H. E. 01692), upon which patent was issued April 23, 1915." (Tr. 79-80.)

THE EVIDENCE BEFORE THE TRIAL COURT

The evidence submitted to the trial court was brief and may be conveniently abstracted by subjects.

Construction and Occupancy of the O'Donnell Cabin.

Al Small testified: Small, working for Cole in August, 1901, laid the sides of a cabin three, four or five logs high on what is now the west half of Section 12. (Tr. 235.) The witness was next on the land in the spring — April or May — 1902. (Tr. 238.) No one was then occupying the cabin and it was still incomplete. (Tr. 238.) The walls were then laid in an open square about five and one-half feet high, but the structure had no roof or rafters. (Tr. 238.) The witness was not there again until the first of the winter—about November, 1902. The cabin was then completed, but no one was there. (Tr. 238.) About a year later in the fall of 1903, the witness visited the cabin again. (Tr. 238.) No one was living there, but the witness found food

and a bed in the cabin. He did not visit the cabin again until 1909. (Tr. 238.)

The same witness, recalled at a later stage of the trial, testified: In 1901 and 1902, O'Donnell was freighting for a mine in that vicinity and in 1902 for about three weeks O'Donnell went to the cabin at night and came down in the morning. (Tr. 245, 246.) The witness once went up to the cabin with O'Donnell before it was completed. This was probably in the winter of 1901 or 1902. (Tr. 245, 246.)

Mrs. Hannah Kline, O'Donnell's sister, testified: In 1901 and 1902 and 1903 her brother Dan O'Donnell was working for a mine in the vicinity of Maple Falls and claimed a homestead up there. She would not be certain about the time. (Tr. 67.) The family home at that time was at Lawrence (near Bellingham), and her brother Daniel made his home with the family there. He always voted at Lawrence. (Tr. 250.) He "would go away to work, but he never went away to make his home away from home." (Tr. 250.) As nearly as the witness could remember her brother spoke of claiming a homestead for about a year, and then gave it up. (Tr. 251.)

David Russell and Thomas Thompson testified: They cruised and selected the land in question for the Railway Company some time the last of April or the first of May, 1902 (Tr. 257, 259), crossing it several times to enable them to estimate the timber on each five acres. (Tr. 257, 258, 261.) They found no notices, cabins or improvements of any kind on the land, and no evidence that it was occupied by anyone. (Tr. 258, 259.)

The Two Surveys.

The official plat of survey of the township was filed in the local land office February 6th, 1907. Prior to that time there was an unofficial survey known as "the old Galbraith survey" (Tr. 236), and when the witness Small located the cabin for Cole it was by the Galbraith survey. (Tr. 235.) According to that survey the cabin was located in one of the east forties of Section 11. (Tr. 239.) It would be a question whether it was in the Southeast or the Northeast forty acres of the NE¹/₄ of Section 11 by the Galbraith survey. (Tr. 256.) The official survey moved the east line of Section 11 westward approximately 825 feet—from fifty to fifty-five rods (Tr. 256), and by this shifting of

the lines the cabin fell into Section 12 of the official survey. (Tr. 236, 239.)

On plaintiffs' Exhibit 1 one of the defendants' witnesses, a surveyor, at the request of the court, indicated the relation of the corner common to Sections 1, 2, 11 and 12, of Township 39, according to the old Galbraith survey and the new official survey. (Tr. 256.)

There seems always to have been a great deal of uncertainty as to the location of the O'Donnell cabin with reference to the official survey. Small said the cabin "would be about fourteen rods from the old Galbraith line, which would bring it pretty close into the second forty—either the Southeast corner of the first quarter ($NW\frac{1}{4}$ $NW\frac{1}{4}$ of Section 12), or the Northeast corner of the second quarter ($SW\frac{1}{4}$ $NW\frac{1}{4}$ of Section 12)." (Tr. 235.) Mr. Cannon, attorney for McPhee at a prior stage of the proceedings, was called by McPhee as a witness, but was uncertain of the location of the cabin, and spoke of "McPhee measuring the lines as to where this cabin was." (Tr. 247.) Even the civil engineer said "it would be a question" in which forty the cabin was located according to the old survey. (Tr. 256.)

Description of Land Claimed by the Several Claimants.

Cole claimed the four east forties of Section 11 by the Galbraith survey. (Tr. 239.) His notices so described his claim. (Tr. 239, 245.) No evidence was submitted at the trial to show what land O'Donnell claimed. The testimony on this point will be carefully quoted. Al Small testified that "Cole sold his improvements to one by the name of Dan O'Donnell." (Tr. 236.) On a visit to the cabin in 1903 Small found a notice on the door signed by Dan O'Donnell. "It described that land as a homestead." (Tr. 48.) While the witness may have intended to state that the claim of O'Donnell was identical with that of Cole, which he had described, the matter is doubtful from a reading of his entire testimony. (Tr. 244, 245.) The only other witness who testified at the trial concerning the O'Donnell settlement was Fred Benson, who visited the cabin in 1904 and found an O'Donnell notice on the door, "the substance of which was that Mr. Dan O'Donnell, if I remember all right, had taken that for a homestead and gave the description. I don't remember the exact description it gave that he was taking." (Tr. 244.) To ascertain what O'Donnell

really claimed it was therefore necessary to refer to his own testimony as it appears in the Land Office record attached as an exhibit to the second amended complaint. *He twice swore that it was the land which has since been patented to Thurston.* In an affidavit sworn to by him before the Honorable W. H. Pemberton (now a Justice of the Supreme Court of the State of Washington), he specifically described his homestead claim as the E $\frac{1}{2}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 12. (Tr. 181.) And when testifying as a witness for Thurston in the latter's contest with the Railway Company, he swore that the land he had claimed and occupied was the N $\frac{1}{2}$ NW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$ and NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12. (Tr. 151, 152.) This latter description includes one forty acres of the McPhee claim—the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12—but in that respect was probably inadvertent, since the inquiry had to do only “with the tract of land embraced in Mr. Thurston's homestead application” (Tr. 142, 154), which did not embrace the 40 acres last mentioned. Read as a whole and in connection with the other testimony given at the same hearing, the gist of O'Donnell's testimony plainly was that the land Thurston was contesting with the Railway Company, viz., the E $\frac{1}{2}$ NW $\frac{1}{4}$ and the NE $\frac{1}{4}$ SW $\frac{1}{4}$,

Section 12, was the same land that O'Donnell had claimed as a homestead until he sold it to Thurston. (Tr. 151, 154.)

The Transaction Between Thurston and Beebe.

Peter Beebe testified somewhat to the same effect as stated in his affidavit theretofore given McPhee: That in 1906 he settled upon and claimed as a homestead the $S\frac{1}{2}$ $SW\frac{1}{4}$ of Section 1, and the $N\frac{1}{2}$ $NW\frac{1}{4}$ of Section 12; that in November, 1906, in consideration of fifty dollars paid him by Thurston, he released to Thurston his rights in the $SE\frac{1}{4}$ $SW\frac{1}{4}$ of Section 1, and then re-arranged his own homestead to cover the three forties in Section 12, described as the $W\frac{1}{2}$ $NW\frac{1}{4}$ and the $NW\frac{1}{4}$ $SW\frac{1}{4}$ of that section, besides retaining the $SW\frac{1}{4}$ $SW\frac{1}{4}$ of Section 1. (Tr. 83-86, 242-243.) Afterwards, in consideration of fifty dollars paid him by McPhee, he relinquished the three forties in Section 12 to McPhee and proved up on the $SW\frac{1}{4}$ $SW\frac{1}{4}$ of Section 1 (Tr. 243), for which he received patent.

Thurston's testimony relating to this transaction, as given in the Land Department's decision of

April 8th, 1916, quoted in the trial court's opinion on the motion to dismiss (Tr. 216) was as follows:

"Q. Now, when did you take up your residence on the land?

"A. That same fall; being a quarter of a mile back from there I drops one forty and takes another forty, and I takes my improvements and puts them down on another forty. I didn't want to move my children and family up in the cabin so I put up a cabin there."



SPECIFICATION OF ERRORS

I

The District Court erred in overruling the separate motions of the defendants to dismiss the action upon the ground that the second amended bill of complaint failed to state facts sufficient to constitute a valid cause of action in equity.

II

The District Court erred in making and entering its final decree, dated October 3rd, 1922, adjudging that the defendants hold the legal title to the lands

in controversy in trust for the plaintiffs, and quieting the title of the plaintiffs to said lands against the claims of the defendants and those claiming under them.

III

The District Court erred in refusing to enter a decree quieting the title of the defendants to the lands respectively claimed and held by them against the claim of the plaintiffs, as prayed in the defendants' cross-complaint.

IV

The District Court erred in refusing to hold and decide upon the motions to dismiss that the only question presented by the second amended complaint was a question of fact as to whether or not any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the Railway Company, and that said question of fact had theretofore been submitted to and determined by the United States Land Department and was therefore not within the jurisdiction or power of the District Court to re-examine or determine in this suit.

V

The District Court erred in refusing to hold and decide upon the final hearing that the only question presented by the pleadings and proof was a question of fact as to whether any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the Railway Company, and that said question of fact had theretofore been submitted to and determined by the United States Land Department and was therefore not within the jurisdiction or power of the District Court to re-examine or determine in this suit.

VI

The District Court erred in refusing to hold and decide upon the motion to dismiss that the second amended complaint totally failed to show that any adverse right or claim to the lands in controversy had attached or been initiated at the time of the selection of said lands by the St. Paul, Minneapolis & Manitoba Railway Company.

VII

The District Court erred in refusing to hold and decide upon the final hearing that the evidence totally failed to show that any adverse right or claim to the land in controversy had attached or been initiated at the time of the selection of said land by the St. Paul, Minneapolis & Manitoba Railway Company.

VIII

The District Court erred in refusing to hold and decide upon the motions to dismiss and upon all the evidence in the case, that upon the abandonment or disposal of the land in controversy by the claimants prior to the plaintiff, the pending, but unapproved, selection list of the St. Paul, Minneapolis & Manitoba Railway Company attached to said lands, and immediately segregated them from subsequent entry or claim by plaintiffs or their predecessors, as public lands under the homestead laws.

IX

The District Court erred in refusing to hold and decide that the adjudication of the United

States Land Department against the claim of the plaintiffs' predecessor Beebe, immediately prior to Beebe's relinquishment in favor of the plaintiffs, permitted the pending, but unapproved, selection list of the Railway Company to attach to the lands in controversy, and precluded the initiation of any right or claim thereto as public lands by the plaintiffs under the homestead laws.

X

The District Court erred in holding and deciding upon all the evidence in the case that the plaintiffs were in any event entitled to prevail as to any of the land in controversy other than the Southwest quarter of the Northwest quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., since there is no evidence whatsoever showing, or tending to show that any of the other land in controversy was occupied or claimed by any person whomsoever at or prior to the time of the filing of the selection list by the Railway Company.

XI

The District Court erred in refusing to hold and decide that in no event could the plaintiffs prevail

as to any of the land in controversy now lying in Section Twelve (12), Township Thirty-nine (39) North, Range Six (6) E., W. M., except the portion thereof previously known and described as a part of Section Eleven (11), said township and range, and occupied or claimed under the homestead laws of the United States by some predecessor of the plaintiffs at the time of the filing of the railway company's selection list.



ARGUMENT

The discussion of these assignments may conveniently be grouped under a few headings. The first question to be considered naturally is whether the decision of the Land Department was one properly within the province of the court to review. The plaintiff in his various applications to the Land Department had submitted the affidavits of his witnesses, and had requested the Department also to consider its own records in the Thurston case. This was accordingly done and in the decision of the Secretary of the Interior, announced April 18th, 1916, upon McPhee's petition for the exercise of supervisory authority, the facts in the

two records were summarized and the case was found to turn upon *the question of fact* whether or not O'Donnell, from whom both McPhee and Thurston claimed, had, at the time of the filing of the selection list, been a settler on the Thurston tract or the McPhee tract. The situation was presented of witnesses testifying at Thurston's contest with the Railway Company that the settlement and improvements of O'Donnell were on Thurston's homestead, and later making affidavits in aid of McPhee, to the effect that such settlement and improvements were on the land McPhee was claiming. But the alleged settler himself, O'Donnell, in his affidavit for McPhee, declined to retract the testimony he had given for Thurston, that his settlement was on the Thurston homestead, and merely said he could not give the exact legal description of the place where he had settled, *according to the new survey*. Herman Steiner, who had helped O'Donnell write his notice of homestead claim, and had signed it as a witness (Tr. 150) never gave McPhee an affidavit or in any way altered his testimony given at the Thurston contest (Tr. 148, 150), and the similar affidavits made by him (Tr. 182, 123) that the settlement and improvements of O'Donnell were on the Thurston homestead.

The Decision of the Land Department Was Based Upon a Disputed Question of Fact and Was Not Subject to Review and Reversal by the District Court.

The Land Department after reviewing the conflicting testimony in the McPhee and Thurston records correctly said: "From the above facts it is apparent that McPhee's claim is based upon the proposition that the land applied for by him was excepted from the Railway's selection by virtue of O'Donnell's settlement." It then held that "McPhee failed to show any privity with O'Donnell or exactly what land O'Donnell claimed under his settlement." It is unnecessary to quote the remainder of the opinion, the gist of which was that the settlement of O'Donnell asserted by McPhee was the same as that asserted by Thurston, as transferee from O'Donnell, and that McPhee had failed to establish his contention that the O'Donnell settlement had in fact been upon the claim of McPhee, and not upon the homestead of Thurston, as the Department had previously found in the Thurston case, *substantiated by a field investigation*. (Tr. 218.)

In reversing the conclusion of the Land Department, the trial court used this language:

“The legal conclusion of the Commissioner *as to the fact of residence and the boundaries* of the O'Donnell claim so far as settlement and residence is concerned is erroneous.”

This language, without more, demonstrates that the conclusion of the trial court was based upon a question of fact which he conceived had been erroneously determined by the Land Department. Of course the issue as to what land O'Donnell had occupied and claimed was one of unmixed fact. It could not be determined by reference to any rule of law, or otherwise than by the testimony of witnesses familiar with the acts O'Donnell had done to evidence the location and boundaries of his claim. O'Donnell himself was one of those witnesses, and there were many others. Some had testified that the claim comprised the Thurston homestead, others had testified that it comprised the McPhee homestead claim, and many had testified to both these things on different occasions. O'Donnell himself and his witness Steiner, the two men best acquainted with the fact, had supported Thurston in his contest with the Railway Company by their

sworn testimony, and were among the few witnesses who had never contradicted themselves. As will be hereafter pointed out in more detail, the question was one of great confusion, due to the shifting of the survey, and O'Donnell had been careful to say in the affidavit McPhee had obtained from him that he was "not acquainted with the legal description of said land according to the new survey of same made in 1907, and was unable to state from his own knowledge the exact legal description of the land acquired by him." (Tr. 92.) It is therefore respectfully submitted that in undertaking to weigh the conflicting testimony and to substitute its own appraisal thereof for the judgment of the Land Department, the trial court went beyond its proper province, as defined by many conclusive authorities.

Courts have no power to review findings of fact by the Land Department which were within its province and duty to make.

Daniels v. Wagner, 237 U. S. 547, 59 L. Ed. 1102.

The conclusion as to ultimate facts finally reached by the Land Department must be accepted by the courts, although differing from the con-

ception of such facts entertained by the Department at previous stages of the controversy.

Greenamayer v. Coate, 212 U. S. 434, 53 L. Ed. 587.

A decision of the Land Department that a contestant was the owner of certain improvements under a statute giving such owner a preferential right to the land is binding on the courts, *unless there is no evidence to support it*.

Harnage v. Martin, 242 U. S. 386, 61 L. Ed. 382.

In the administration of the public lands the decision of the Land Department upon questions of fact is conclusive, and only questions of law are reviewable in courts.

Catholic Bishop of Nisqually v. Gibbon, 158 U. S. 155, 39 L. Ed. 931.

The Land Department of the United States is administrative in its character, and it has been frequently held by this court that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and its judgment therein is final.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 L. Ed. 90.

Courts will not entertain an inquiry as to the extent of the investigation by the Secretary of the Interior and his knowledge of the points involved in his decision of a contest in the Land Department, nor as to the methods by which he reached his determination.

DeCambria v. Rogers, 189 U. S. 119, 47 L. Ed. 734.

Where the question is one of fact as to whether one, when he demanded his patent certificate, as against other contesting claimants, had conformed to the requirements of the Donation Act, and this was determined by the Land Department after a contest in which the contending parties appeared and full opportunity was given to be heard; such determination is conclusive on all questions of fact and final to the same extent as those of other judicial or quasi-judicial tribunals.

Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929.

This court's recognition of the rule was recently expressed in *Christie v. Great Northern Ry. Co., et al.*, decided November 20th, 1922, 284 Fed. 702, in which it was said:

"The appellants are in no position to assert the illegality of the title. Upon their own showing they

are estopped by the proceedings in the Land Department. They attacked the validity of those proceedings on the ground of errors in fact or errors of mixed law and fact, and not upon errors of law, disregarding the rule that the jurisdiction of the courts may be invoked only upon the showing that the Land Department has disobeyed or misapplied the law applicable to the case."

Citing *Marquez v. Frisbie*, 101 U. S. 473.

The second amended complaint included the complete Land Office record in both the McPhee and Thurston cases. The conflicting evidence thus presented furnished no more ground for the court to entertain this suit than an identical complaint would have furnished had the prayer been one for the annulment of Thurston's patent. If the Land Office records, as submitted with the second amended complaint in the present case, are sufficient to justify a court of equity in holding the Railway Company trustee for McPhee, it follows that upon a similar complaint the court will require that Thurston be held trustee for the Railway Company of the adjoining land. (We may mention that no such suit is contemplated, as the timber has been cut from the Thurston homestead, practically destroying its value.) The same question of fact underlies both cases. It has been determined

in both cases by the Land Department upon a clear conflict of sworn testimony. It ought not to be re-examined by the courts either in one case or the other. The case is not one in which, by an error of law, McPhee has been prevented from exhibiting his evidence to the Land Department. There has probably never come to the Court's notice an application in which so many hearings, rehearings and reviews were granted and exhaustively considered as in the case of the McPhee homestead application. Two of these were presented by Attorney Phillips (Tr. 15-23), two by Attorney Cannon (Tr. 24-34), one by Attorney Gregory (Tr. 42-43), one by William Jennings Bryan (Tr. 48), two by Attorney Herrick separately and three by Attorneys Herrick, Kellogg and Thompson together (Tr. 49-107). The matter went to the Department of Justice, and the Attorney General addressed an inquiry to the Land Department (Tr. 107-108). The Assistant Secretary of the Interior replied to the Attorney General (Tr. 108-111), and the Assistant Commissioner of the General Land Office gave a final reply to McPhee (Tr. 113-114). Following each application in the transcript will be found a ruling of the Department thereon. It thus

appears that plaintiff had the very fullest opportunity to present his case to the Land Department, which in every instance decided against him upon a question of fact, and now to permit the same controversy to be retried in the courts would result in establishing the novel principle that the Federal courts may try *de novo* every disputed question of fact relative to the disposition of the public lands.

The Case Does Not Turn Upon the Geographical Location of the O'Donnell Cabin.

It seems to have been the idea of McPhee and his attorneys in the Land Department proceedings that if they could establish the fact that *after the official survey* the cabin built by Cole and completed by O'Donnell was located outside the Thurston homestead, and upon the McPhee claim, that fact alone would entitle them to prevail. Thus McPhee in his affidavit of April 18th, 1911, said not a word about what land O'Donnell had claimed, but laid great stress upon his statement that the O'Donnell "improvements were upon the south forty acres of the W $\frac{1}{2}$ NW $\frac{1}{4}$, Section 12". (Tr. 36-37.) The trial court in its decision on the motion to dismiss (which was treated as fixing the law of the case at the final

hearing) seems to have acted upon this theory. The opinion rendered at that time states that "the cabin was built by Cole and O'Donnell, occupied by O'Donnell and was upon the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 12, at the time the script was filed." (Tr. 218.)

The Land Department had not determined the case on the basis of the location of the O'Donnell cabin, but upon the basis of the situs of the O'Donnell homestead claim. The importance of the distinction arises from the fact that when Cole and O'Donnell built the cabin there was no official survey, so that the builders of the cabin therefore were necessarily uncertain as to the particular subdivision in which the cabin would fall when the land came to be officially surveyed. As a matter of fact it was shown at the trial by a certified copy of the field notes of the Surveyor General (Defendants' Exhibit "F"; Tr. 254), and the testimony of a civil engineer, that the section and subdivision lines were shifted approximately 825 feet in that region. (Tr. 256.) By that shift about two-thirds of what had been the east line of forties of Section 11 became the west line of forties of Section 12—the present McPhee claim—and about two-thirds of what had been the west line of forties of Section 12 be-

came a part of the second line of forties of that section—the Thurston claim. (Tr. 256, Defendants' Exhibit "F".) *According to the old survey the cabin was barely over the line dividing the two tiers of forties, which, by the shifting of the survey, have now become substantially identical with the McPhee and Thurston claims, respectively.* (Tr. 256, Plaintiff's Exhibit 1.) To let the case depend, therefore, on the location of the cabin as it stands with reference to survey lines established many years later is to ignore the situation and the claim of O'Donnell as it existed at the time of the filing of the selection list. The official survey was not made until 1907, whereas the selection list was filed on May 9th, 1902, and the cabin is alleged to have been commenced even earlier.

The language of the act describing the lands subject to selection by the Railway Company is clear. Lands were open to selection "to which no adverse right or claim shall have attached or been initiated at the time of making such selection." The selection list filed May 9th, 1902, was unequivocal in claiming "that which will be, when surveyed, the W $\frac{1}{2}$ NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12." (Defendants' Exhibit "A".) Merely because the

shifting of the survey cast upon the land so described a cabin built in furtherance of a homestead claim, it is not to be taken as proven that the builder of the cabin intended to claim that particular land. The question is not, Where does the cabin lie with reference to the subsequently made survey, but, where is the land that the builder of the cabin was then claiming? Obviously the builder himself knew better than anyone else in the world what land he really claimed, and he never stated that he claimed the land now claimed by McPhee. On the contrary, he testified and swore on several occasions that his actual claim was co-extensive with the Thurston homestead. (Tr. 151, 181.) By that testimony he aided Thurston to obtain title in his contest with the Railway Company. In his affidavit later given to McPhee, he merely said that "affiant is not acquainted with the legal description of said land according to the new survey of the same made in 1907, and is unable to state from his own knowledge the exact legal description of the land acquired by him." In short, the man who built the cabin upon which so much stress is placed has twice sworn that the land which he claimed as a homestead did not include the forty acres upon which

McPhee now claims the cabin was located, and he has further stated that he does not know the legal description of the land which he actually claimed "according to the new survey made in 1907," which immediately suggests that it was the running of the new lines in 1907 which left his cabin outside the boundaries the land he intended to claim in 1902. Since he has sworn, with the corroboration of numerous witnesses, that the actual land he claimed in 1902 was that which was subsequently patented to Thurston, it is the Thurston land and not the McPhee tract to which his "adverse right or claim had attached or been initiated," within the meaning of the statute, although perchance by the running of a later survey his cabin may have been cut off from the body of the former tract.

Had O'Donnell, and not Thurston, been the contestant with the Railway Company to the $E\frac{1}{2}$ $NW\frac{1}{4}$ and the $NE\frac{1}{4}$ $SW\frac{1}{4}$ of Section 12, and had he testified for himself as he testified for Thurston that those subdivisions were the land to which his homestead claim had attached in 1902, the Railway Company could not have prevailed by producing McPhee and his witnesses to swear that the O'Donnell cabin was in fact upon the McPhee

claim. O'Donnell would have been protected by the principle of constructive residence, as recognized in *Great Northern Ry. Co. v. Hower*, 263 U. S. 702, 59 L. Ed. 798. While the court held in that case that upon the facts shown there was no constructive residence, it referred with approval to several decisions of the Land Department in which the residence of the homesteader upon one tract was made the basis of awarding him patent to another, when his residence upon the former was in the honest, though mistaken, belief that it was upon the latter, saying:

“In *Kendrick v. Doyle*, 12 Land Dec. 7, the entry-man was honestly mistaken as to the limits of his claim, owing to conflicting surveys, and his house was built in a corner where the boundary line admittedly was in doubt, but the correct survey showed the house to be a little outside the line.”

In that and several cases cited the “residence was held sufficient to satisfy the requirements of the statute.”

It follows that it cannot be said that O'Donnell had initiated a claim to the McPhee tract, merely because his cabin may have been located within that tract as bounded by survey lines run many

years later, if, in fact, he did not claim that land, but claimed adjoining land. He himself, the witness to his homestead notice, and many others have sworn that the land he claimed was what has since become the Thurston tract. According to the statute authorizing the railway selection, the land was not exempt merely because there was a cabin upon it. It was exempt only if an adverse right or claim had attached to it. It is respectfully submitted, therefore, that in basing decision upon the location of the cabin, rather than upon the situs of the claim (to which the cabin was a mere incident), and in reversing the Land Department's determination, based upon a finding as to the situs of the claim itself, the District Court committed a second error.

The O'Donnell Claim Had Not Attached or Been Initiated at the Time of the Filing of the Selection List.

The selection list (Defendants' Exhibit "A") was filed in the Land Office May 9th, 1902. The evidence adduced at the trial fails to show that O'Donnell had initiated his homestead claim at that time, whether to the McPhee tract or the Thurston tract.

His purchase in October, 1901, of the improvements of the prior settler, of course, gave him no settlement right. 2 L. D. 188; 8 L. D. 623; 9 L. D. 329; 13 L. D. 142; 14 L. D. 90; 15 L. D. 69; 18 L. D. 446; 19 L. D. 91, 237; 26 L. D. 616; 27 L. D. 629.

In April or May, 1902, the cabin was roofless and unoccupied. (Tr. 238.) There is some testimony that in the summer of 1902, for about three weeks O'Donnell went to the cabin at night and came down in the morning. (Tr. 245.) But no one testified that he had established a residence or had settled upon the land in May, 1902. The testimony of O'Donnell's sister that he "would go away to work, but never went away to make his home away from home" and that he always voted at the precinct of the family home, is sufficient to show that her brother never in fact actually initiated a homestead claim. The homestead law requires settlement, and O'Donnell never made a settlement. But even if Mrs. Kline were mistaken in saying that her brother never made his home on this land, it is certain that he had not settled or commenced to make his home there on May 9th, 1902.

Of course defendants are bound only by the testimony adduced at the trial; their title cannot be af-

fectured by the *ex parte* Land Office proceedings. The various land office records in the McPhee case attached to the complaint therefore, cannot be referred to for evidence in derogation of the patent. The sufficiency of the acts of O'Donnell to initiate a claim must be found, if at all, in the evidence taken at the trial.

The homestead law was enacted on May 20th, 1862, "to secure homesteads *to actual settlers* upon the public domain." It may be found at sections 4530 *et seq.*, of the U. S. Comp. Statutes, 1916:

Section 1 provides that a homesteader "shall be entitled to *enter* one quarter section or a less quantity of unappropriated public lands."

Section 2 provides that "any person applying to *enter* land under the preceding section shall first make and subscribe before the proper officer, and file in the proper land office an affidavit * * * that such application is honestly and in good faith made * * * and that he or she will faithfully and honestly endeavor to comply with all the requirements of the law as to settlement, residence and cultivation necessary to acquire title to the land applied for * * *; that he or she does not apply to enter the same for the purpose of speculation but in good faith *to obtain a home for himself* * * *, and upon filing such affidavit with the register or receiver

* * * he shall thereupon be permitted to enter the amount of land specified.”

The following section goes on to provide that “no certificate, however, shall be given or patent issued therefor, until the expiration of five years from date of such entry, and if at the expiration of such time * * * the person making such entry * * * proves by two credible witnesses that he has *resided upon or cultivated* the same for a term of five years immediately succeeding the time of filing the affidavit * * * then * * * he * * * shall be entitled to a patent.”

By section 5 of the original act (U. S. Comp. Stat., section 4552), it was provided that if it should be proved to the satisfaction of the register of the land office “that the person having filed such affidavit has actually changed his residence or abandoned the land for more than six months at any time, then and in that event, the land so entered shall revert to the government.”

As stated in *St. Paul M. & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. Ed. 941:

“By that act, differing from the pre-emption law, the rights of the settler only attached to the land from the date of the entry in the proper land office.”

Settlement, however, was required to follow the entry in the land office, and residence and cultivation for five years following the settlement were required in order to earn the title.

By the act of May 14, 1880 (U. S. Comp. Stat. 1916, sections 4536, *et seq.*), homestead settlements were first permitted to be made upon unsurveyed public lands. This statute also modified the homestead law in another important particular. By this act, for the first time, "both as to surveyed and unsurveyed public lands, the right of the homestead settler was allowed to be initiated by and to arise from the act of settlement, and not from the record of the claim made in the land office." The *Donohue* case, *supra*. This result arose from section 3 of the act (U. S. Comp. Stat., section 4538), reading as follows:

"That any settler who has settled, or shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and to perfect his original entry in the United States land office, as is now allowed to settlers under the pre-emption laws to put their claims on record; and *his rights shall relate back to the date of settlement*, the same as if he settled under the pre-emption laws."

The *Donohue* case defines "settlement" as follows:

"Both under the pre-emption law and under the homestead law, after the act of 1880, the rights of the settler were initiated by settlement. In general terms it may be said that the pre-emption laws (Rev. Stat., sections 2257 to 2288, U. S. Comp. Stat. 1901, pp. 1381-1385), as a condition to an entry of public lands, merely required that the appropriation should have been for the exclusive use of the settler, that he should erect a dwelling house on the land, reside upon the tract, and improve the same. *By the homestead law, residence upon and cultivation of the land was required.* Under neither law was there a specific requirement as to when the improvement of the land should be commenced or as to the nature and extent of such improvement, nor was there any requirement that the land selected should be enclosed."

It is noteworthy that in every case cited by the plaintiff at the various stages of this litigation, the settler was actually living upon the land at the time of the railroad selection. Thus, in *Nelson v. Northern Pacific R. Co.*, 188 U. S. 108, 47 L. Ed. 406, the court said:

"In the year 1881, *three years before the definite location* of the road, the defendant Harry Nelson went upon the above land and *occupied* it and has

since *continuously resided* thereon." (The italics are Justice Harlan's.)

In *Northern Pacific R. Co. v. Trodick*, 221 U. S. 208, 55 L. Ed. 704, the court said:

"It appears from the evidence that one Martin Lemline established his residence on the land *with his family* in 1877 and *continued to reside* there until his death sometime in 1891. His improvements on the premises were of the estimated value of \$1,000. * * * The company filed its map of definite location on July 6th, 1882, but one Lemline was then *in the actual occupancy of the land as a residence*."

In *St. Paul, M & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. Ed. 941, it was stated:

"Jerry Hickey, having the legal qualifications, in March, 1893 *settled* upon unsurveyed public land. * * * Two years and eight months after the *settlement* by Hickey, that is, in December 1895, the Railway Company made indemnity selections embracing not only the *land upon which Hickey had built his residence*, but all the unsurveyed land contiguous thereto."

Let it be remembered that it was in this case that Chief Justice White said, as previously quoted:

"By the homestead law residence upon and cultivation of the land was required."

And it is important also to note that Chief Justice White said of the question of the propriety of the award of the land to the Railway Company:

“When that question is considered in its ultimate aspect it will be apparent, not only that it is related to the question of the *validity* of the settlement of Hickey, but it necessarily follows that the *validity* of that settlement in effect demonstrates the error of law committed by the Department in its ruling as to the Donohue entry.”

Which makes it clear that the court was not only concerned with the settler's claim, but with the validity of that claim.

In *United States v. Great Northern R. Co.*, 254 Fed. 522, it was said:

“The evidence shows quite satisfactorily that one L. C. Thebo *settled* on the land in dispute some time prior to March, 1902, claiming it as a homestead, and *continued to live there* for 2 or 2½ years.”

There is ample affirmative authority that the settlement which initiates the claim under the homestead laws is the first act of actual residence, and is not accomplished by putting up notices, or other acts of a transient nature. It would seem that *Great Northern R. Co. v. Hower*, 236 U. S. 702, 59

L. Ed. 798, is absolutely controlling. That case involved a contest between a settler and the present defendant, under the act of August 5, 1892, involved here. The land in dispute was the North-east quarter of Section 2. That quarter section was selected by the Railway Company on March 24th, 1894. The homesteader Carter, claimed that he had settled on the land December 1st, 1893. At that time he purchased the improvements of a former settler upon a tract of unsurveyed land to the east.

“He thereupon established a residence in the cabin of a former settler and commenced the construction of a new dwelling house which he finished in the spring of 1894; that he moved his family into this dwelling house and had continued to reside therein and on said land with his family to the time of said hearing.”

While intending at all times to claim the *North-east* quarter of Section 2, his dwelling house and residence were, in fact, all situated in the *North-west* quarter of Section 2. After establishing his residence he constructed, or took part in the construction of a trail “extending over and across a part of the Northeast quarter of Section 2,” and also at times used a stable on said Northeast quar-

ter for storage purposes. Furthermore, he had posted notices of his claim thereon. The Northeast quarter of Section 2 was patented to him upon the ground that:

“Carter’s residence was established and maintained in good faith and in the belief that his dwelling house was on the land embraced in his homestead application, and that such residence, taken in connection with the subsequent construction of trails and the stable or barn on the Northeast quarter of said Section 2, was a constructive residence on said Northeast quarter.”

The Railway Company sued to establish title and finally prevailed in the U. S. Supreme Court.

It is apparent that Carter had done far more than O’Donnell at the time of the railroad selection. He had built a barn, constructed a trail and posted notice on the land in controversy, and in addition had established his residence only a quarter of a mile away, in the honest belief that he was living on the land he claimed. There is no evidence that O’Donnell ever settled on this land until many months after the scrip was filed, and according to his sister he never established a residence there at all. In the *Hower* case the Supreme Court held as follows:

"Conceding that Carter acted in entire good faith, and that he meant to comply with the law, it is nevertheless the fact that his settlement was upon, and the land cultivated was in, a different quarter section from that which he undertook to enter, and the quarter which he contends for was separated from the one which he occupied by a 40-acre tract. It is true that some time during his occupancy a trail was laid out, and a small stable constructed on the northeast quarter. But the fact remains that his residence and improvements by way of cultivation were upon a quarter section entirely separate and apart from the one to which title is now claimed. It seems to us to be going too far to say that, because of the trail to the northeast quarter and the small stable thereon, and the notices posted upon it, there was a constructive residence on that quarter, although the actual residence was upon the other quarter.

"We have been cited to no cases in the Land Department which go so far as is required in this instance in order to support title. We have been unable to find anything in our own decisions which would sanction such liberal treatment of the statutory requirement as to residence. * * *

"In this case it appears that the residence was not upon any part of the tract claimed by the homesteader; nor was the residence upon a contiguous tract of land, but was entirely separate and apart from the land claimed. Under these circumstances we are constrained to the conclusion that the com-

plaint, upon its face, made a case entitling the plaintiff in error to the relief sought. * * *

“The right (of homestead) is a statutory one, and in this case it was essential to show actual residence upon the land as a prerequisite to the granting of a patent and obtaining title to the same.”

In *Small v. Rakestraw*, 196 U. S. 403, 49 L. Ed. 527, it was held that:

“A residence for voting purposes in another precinct from that in which a homestead entry lies precludes the entryman from claiming residence at the same time on the land for homestead purposes.”

In *J. J. McCaskill Co. v. United States*, 216 U. S. 504, 54 L. Ed. 590, the homesteader's house was unfit for habitation. He had never moved his family there and he did not stay there more than one night in a week. The court cancelled his patent at the suit of the government, and summarized the requirements of the homestead law as follows:

“It may be well here to consider what the law requires. It gives the right of entry of 160 acres of land as a homestead, upon the condition, however, which must be established by affidavit, that the ‘application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other persons.’ That applicant will honestly endeavor to comply with

the requirements of settlement and cultivation, and does not apply to enter the same for the purpose of speculation. The purpose of the law, therefore, is to give a *home*, and to secure the gift, the applicant must show that he has made the land a home. Five years of residence and cultivation for the term of five years he must show by two creditable witnesses.

“Residence and cultivation of the land are the price that is exacted for its payment.”

In *Whaley v. Northern Pacific R. Co.*, 167 Fed. 664, the court said:

“Lastly, complainant has made a very weak showing under the homestead laws of the United States. It would be a very severe strain upon the liberality of the homestead act to extend its protection to complainant, who really never made an earnest effort to establish his actual home upon the place to the exclusion of any other home. He seems to have had a notion that ‘representation’ would do, and that this was possible by occasional visits to the place, followed by some slight evidences of occupancy and cultivation. I do not believe that such acts constitute that good faith demanded of one who claims as a homesteader. Inhabitaney is always required, and surely it is not a compliance with the law for a man to file on a tract of land with no intention of making it his home, with no purpose of living there, with no intention of cultivating the place and of acquiring it for a place to reside in. Occasional visits made for a day or

two every few months, when such visits are made solely for the purpose of complying technically with the law, do not constitute a compliance with the statute. To establish a residence under the homestead laws, there must be a combination of act and intent, the act of occupying and living upon the claim and the intention of making the place a home to the exclusion of a home elsewhere."

A claim of occupancy set up to defeat the right of indemnity selection cannot be recognized if it appears that at the date of selection the alleged occupant had not established residence upon the tract, but was maintaining a home elsewhere, although he may have fenced and cultivated the land and erected buildings thereon.

Banks v. Northern Pacific R. Co., 25 L. D. 542.

The homestead law is one "to secure homesteads to *actual settlers* upon the public domain." The act of May 4th, 1880, allowing settlement upon unsurveyed lands, provides that "the claimant's rights shall relate back to the date of *settlement*." Here, there had been no settlement at the time the selection list was filed, and in fact, according to the unbiased testimony of Mrs. Kline, there never was any settlement by O'Donnell at any time. The claim of Cole, of course, had been extinguished at

the time of the sale of the improvements to O'Donnell, and was no bar to the railroad's selection.

Oregon & California R. Co. v. U. S., 190
U. S. 186, 47 L. Ed. 1012.

If we are wrong in saying that O'Donnell had not settled on the land on May 9th, 1902, we are at least justified in saying that the question is so shrouded in doubt as to furnish no grounds for the annulment of the patent.

"The respect due to a patent, the presumptions that all the preceding steps required by law had been observed before its issue, the immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside or annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof."

Maxwell Land Grant case, 121 U. S. 325,
30 L. Ed. 949.

In the case cited the court also said:

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it

cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal."

To the same effect see:

Colorado Coal Etc. Co. v. United States, 123 U. S. 307, 31 L. Ed. 182; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 31 L. Ed. 747; *United States v. Des Moines, Nav. Etc. Co.*, 142 U. S. 510, 35 L. Ed. 1099; *United States v. Budd*, 144 U. S. 154, 36 L. Ed. 384; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 42 L. Ed. 144; *United States v. Stinson*, 197 U. S. 200, 204, 49 L. Ed. 724.

If the O'Donnell Claim was Extant at the Time of the Filing of the Selection List, it had Lapsed by Abandonment, and Allowed the Selection to Attach Several Years Before the Claim of Either Thurston or McPhee was Initiated.

It will be remembered that O'Donnell bought the improvements of Cole in 1901, and that Thurston did not buy the improvements of O'Donnell until

1906. The evidence is undisputed that at least three years prior to the purchase by Thurston, O'Donnell had abandoned the claim. His sister testified that he claimed the homestead "for something like a year, and then gave it up." (Tr. 251.) This was uncontradicted, and was given by the plaintiff's own witness. The land, then, was vacant and unoccupied at least from 1903 to 1906.

It appears to be the theory of the second amended complaint that the *homestead claim* of O'Donnell was susceptible of assignment and was in fact transferred by him to Thurston, who is afterwards alleged to have conveyed "his improvements and possessory rights to Beebe," who in turn relinquished in favor of McPhee, the plaintiff. These allegations ignore the settled rule that the so-called possessory rights of a homestead settler are personal to himself and incapable of transfer to another. It is firmly established that the only valid transfers which a settler may make are first, a sale of his improvements—that is, the physical property which he has placed upon the land, and not his inchoate right to earn the land by personal occupancy; and second, a relinquishment to the United States, which re-opens the land to new settlement

and entry. Therefore, one who purchases the possessory claim and improvements of another gets nothing but the physical improvements and does not thereby project back his own settlement to the date his assignor established residence.

If these principles are correct, O'Donnell passed nothing but his cabin to Thurston, and if at the time O'Donnell vacated the land the selection of the Railway Company attached to it and segregated it from entry, the later claims of Thurston, Beebe and McPhee were incapable of inception, since the land, from the time the railroad selection attached, was not public land.

The following is quoted from the recent decision of the Supreme Court of the United States in *Bailey v. Sanders*, 228 U. S. 603, 57 L. Ed. 985, as conclusively denying any right of sale of a homesteader's possessory claim prior to final proof:

"It is further contended that the homestead law does not prohibit, but impliedly permits, an entryman to agree, in advance of commuting his entry, to sell the land, and therefore that the Land Department made a mistake of law in canceling Hateley's entry because of his agreement with Bailey. The contention is not sound. Section 2289 of the Revised Statutes, as amended by the act of March

3, 1891, 26 Stat. at L. 1095, 1098, chap. 561, U. S. Comp. Stat. 1901, pp. 1388, 1535, creates the homestead right and names the beneficiaries. Section 2290, as amended by the same act, requires any person applying to enter land under the preceding section to make affidavit that, among other things, 'he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which he or she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person, except, himself or herself.' It was under these sections that Hatley's preliminary entry was made. Section 2291, in prescribing the time and manner of making final proof, requires the applicant to make 'affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred eighty-eight,' which permits alienation for church, cemetery, school, and other enumerated purposes, none of which is present here. Thus, the homestead law not only proceeds upon the theory that the land is to be acquired for the exclusive benefit of the entryman, but contains provisions which make it impossible for him to perfect his claim, after alienation or contract therefor, without committing perjury. True, Section 2301, as amended by the act of March 3, 1891, supra, under which Hatley's entry was commuted, says nothing about alienation, but its only

purpose is to give the entryman an option to substitute the minimum price of the land for a part of the five years of residence and cultivation otherwise required. In other respects the operation and application of Sections 2290 and 2291 are not affected by it. We are therefore of opinion that the Secretary of the Interior did not err in ruling, as he did, that 'entering into such forbidden agreement ended the right of the entryman to make proof and payment, and rendered him incompetent to further proceed with his entry.' "

In *Cascade Public Service Corporation v. Railroad*, 59 Wash. 376, 109 Pac. 1062, the Supreme Court of Washington, per Chief Justice Rudkin, said:

"It is firmly established that any contract or agreement by a homesteader to transfer his claim or any interest therein before final proof, except as expressly authorized by the laws of the United States, is contrary to public policy, and void."

Further authorities are cited in the opinions from which we have quoted, and are therefore unnecessary of inclusion in this brief.

Of course the entryman's improvements are valuable rights which he may legally convey, but the purchase confers no settlement right on the purchaser.

“The privilege which may and should be thus accorded to the settler is personal to him, because no transferable right is acquired by settlement, inhabitancy, occupation, cultivation or improvement of the public lands, and therefore, one who, after a railroad indemnity selection has been proffered or tendered and regularly noted of record in the local office, purchases the possessory claim and improvements of another, does not thereby strengthen the position resulting from his settlement upon the land or other initiation of claim thereto after such selection was noted of record. He would be acting with full knowledge of the selection and his rights would be subordinate to the inchoate claim of the company thereunder.”

Dunnigan v. Northern Pacific R. Co., 27
L. D. 467.

To the same effect is *Sproat v. Durland*, 2 Okla.
34, 35 Pac. 682, 886.

The only way a settler can dispose of his rights in the land is by statutory relinquishment under the act of May 14th, 1880 (U. S. Comp. Stat. 1916, Section 4536.) *Persons v. Persons*, 113 Ia. 745, 84 N. W. 668; *Palmer v. March*, 34 Minn. 127, 24 N. W. 374.

That section provides that “when a preemption homestead or timber culture claimant shall file a

written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office."

While a relinquishment is not a contract, but merely releases the homesteader's claim to the United States, and has no effect until filed (*Fain v. United States*, 209 Fed. 525, 126 C. C. A. 347), it has been held to create a statutory right on the part of the succeeding entryman to make application for the land. *St. Paul, M. & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. Ed. 941. But in considering whether the settlement claim of O'Donnell was transferable to Thurston, it is sufficient to say that no relinquishment by O'Donnell was ever "filed in the local land office," but the transfer of right was attempted to be made by personal contract, and was therefore ineffective under the authorities cited. In short, we are not obliged to consider what rights the succeeding claimants would have obtained had O'Donnell relinquished the land to the United States, as he never did so. He simply abandoned the land, and about three years later sold his improvements.

The most that can be said of the effect of the transfer from O'Donnell to Thurston is that the existing claimant abandoned his possessory rights in 1903, and several years later sold his improvements and that thereupon the succeeding claimant attempted to initiate a new right. We are therefore brought to the consideration of the effect of the then pending selection list as segregating the land from entry and preventing the attachment of any new adverse claim.

The act of Congress under which the selections were made (27 Stat. 390, approved August 5, 1892) recites that under ruling of the General Land Office, the extension into Dakota Territory of the limits of the grants of land made by Congress to aid in the construction of several lines of railroad now owned by the St. Paul, Minneapolis & Manitoba Railway Company had been denied, and in consequence of said rulings settlers had gone upon said lands, who, under more recent construction of said grants, were liable to be ejected from their claims; and provides for the relinquishment by the railroad of such lands.

Section 2 permits the Railway Company to select, in lieu of the lands so relinquished, "an equal

number of non-mineral public lands * * * not reserved, and to which no adverse right or claim shall have attached or been initiated at the time of the making of such selection."

Section 3 provides that upon the filing by the Railway Company at the local Land Office of a list describing the tract or tracts selected and the payment of the fees prescribed by law and *the approval of the Secretary of the Interior*, he shall cause to be executed in due form and delivered to said Company a patent of the United States conveying to it the lands so selected.

Section 3 further provides that in case the tract so selected shall be unsurveyed, the list filed by the company in the local Land Office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty, and within the period of three months after the lands including any such tract shall have been surveyed and the plats thereof filed in the local Land Office, a new selection list shall be filed by said Company describing such tracts according to survey, etc.

It is apparent from this statute and from the decisions construing similar laws that a selection by a Railway Company of *indemnity* lands does

not become complete or final until approved by the Secretary of the Interior, but that, from the time of its filing and notation upon the Land Office records, it constitutes a continuing claim of inchoate title on the part of the Railway Company, segregating the lands from homestead or other entry during the interim between its filing and approval. In other words, the whole force of the selection is not spent on the day the list is filed, but it continues to assert itself until final approval, with the effect of preventing the attachment of any other claim to the land during the interval.

In considering the rights of a Railway Company under a selection of indemnity lands, it must be distinctly borne in mind that such rights are of a different character, and attach at a different time, from the claim to lands within the primary or place limits. In the case of primary lands the Railway Company's claim attaches and is measured once and for all time by the situation existing at the time of its definite location. No act of selection on its part, or approval by the Secretary of the Interior is required. On the other hand, as to indemnity lands the Company acquires no interest in any specific selections until a selection is made with the

approval of the Land Department, and since the selection of lands of the latter class requires the approval of the Secretary to give it finality, it is obvious that until it obtains that approval it constitutes a continuing claim on the part of the Railway Company to the lands covered by it.

The difference between a claim to primary lands and one to indemnity lands is succinctly stated in *Oregon & C. R. Co. v. United States*, 189 U. S. 103, 47 L. Ed. 726:

“Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make.”

The most recent discussion of the rights acquired by an indemnity land selection appears in *Weyerhaeuser v. Hoyt*, 219 U. S. 380, 55 L. Ed. 258, where the subject was exhaustively considered, and the

companion case of *Northern Pacific R. Co. v. Wass*, 219 U. S. 426, 55 L. Ed. 280. The facts in the Wass case are typical:

“While a filed selection by the St. Paul & Northern Pacific Railway Company of land within the indemnity limits of a railroad grant *was awaiting the action of the Secretary of the Interior*, Fred Wass, in April, 1899, entered upon the land with the intention of making it a homestead, and continued in possession, making improvements, etc|
* * * The selection was subsequently approved and a patent for the lands was issued by the governor of Minnesota, all rights under which became vested in the Northern Pacific Railway Company.”

A suit ensued between the Railway Company and Wass, involving the title, the Railway Company claiming by virtue of its prior selection, and Wass asserting that his homestead claim, though subsequent to the selection, was superior thereto. It will be observed that this case is an exact parallel to the case at bar in so far as the rights of Thurston, Beebe and the plaintiff are concerned, which were initiated subsequent to the Railway Company's selection, unless (a) Thurston, Beebe and the plaintiff can relate their rights back to the O'Donnell claim, which they cannot do, as already demonstrated in this brief; or (b) the Railway Com-

pany's selection, being incapable of attaching to the land then claimed to have been occupied by O'Donnell, lost all its force and could not attach to the lands after O'Donnell abandoned them. The decision of the Supreme Court was in favor of the Railway Company. The court stated the rule applied by the Land Department in the practical execution of land grants from the beginning, as follows:

“Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancelation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.

“There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.

“What effect has been given to a pending railroad indemnity selection?

“Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal; but on August 15, that year, these withdrawals were revoked, and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. *Dinwiddie v. Florida R. & Nav. Co.*, 9 Land Dec. 74. In the circular of September 6, 1887 (6 Land Dec. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. *In fact a railroad indemnity selection, presented in accordance with departmental regulations, and accepted or recognized by the local officers, has been uniformly recognized by the Land Department as having the same segregative effect as a homestead or other entry made under the general land laws.*”

The court then held:

“It is beyond dispute on the face of the granting act of July 2, 1864 (13 Stat. at L. 365, 367, chap. 217), and of the joint resolution of May 31, 1870 (16 Stat. at L. 378), extending the indemnity limits, that it was the purpose of Congress in making the grant to confer a substantial right to land

within the indemnity limits in lieu of lands lost within the place limits. It is also beyond dispute that, as the only method provided by the granting act for executing the grant in this respect was a selection of the lieu lands by the railroad company, subject to the approval of the Secretary of the Interior, that a construction which would deprive the railroad company of its substantial right to select, and would render nugatory the exertion of power of the Secretary of the Interior to approve lawful selections when made, would destroy the right which it was the purpose of Congress to confer. That the effect of holding that lands lawfully embraced in a list of selections duly filed and awaiting the approval of the Secretary of the Interior could, in the interim, be apportioned at will by others, would be destructive of the right of selection, is not only theoretically apparent from the mere statement of the proposition, but has, moreover, in actual experience, been found to be the practical result of carrying that doctrine into effect. See 25 Ops. Atty. Gen. 632. Considering the language of the granting act from a narrower point of view, a like conclusion is in reason rendered necessary. The right to select within indemnity limits was conferred to replace lands granted in place which were lost to the railroad company because removed from the operation of the grant of lands in place by reason of the existence of the rights of others, originating before the definite location of the road. The right to select within indemnity limits excluded lands to which rights of others had attached before the selection, and hence simply required that the selection, when made, should not include lands which, at that time,

were subject to the rights of others. The requirement of approval by the secretary consequently imposed on that official the duty of determining whether selections were lawful at the time they were made, *which is inconsistent with the theory that anyone could appropriate the selected land pending action of the Secretary*. The scope of the power to approve list of selections, conferred on the Secretary, was clearly pointed out in *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496, 511, 33 L. Ed. 687, 694, 10 Sup. Ct. Rep. 341, where it was said that the power to approve was judicial in its nature. Possessing that attribute, the authority therefore involved not only the power, but implied the duty, to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections. This view, while it demonstrates the unsoundness of the interpretation of the granting act which the contrary proposition involves, serves also at once to establish that the obvious purpose of Congress in imposing the duty of selecting and submitting the selections when made to the final action of the Secretary of the Interior was to bring into play the *elementary principle of relation, repeatedly sanctioned by this court* and uniformly applied by the Land Department from the beginning up to this time, under similar circumstances, in the practical execution of the land laws of the United States."

As authority for applying the doctrine of relation and the principle that, in contests involving the

public lands, the first claimant in point of time is deemed to be the first in right also, the court quoted from *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424:

“The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus, the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office; and the patent upon a pre-emption settlement takes effect from the time of the settlement, as disclosed in the declaratory statement or proofs of the settler to the register of the local land office.”

“But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.”

That decision establishes the continuing segregative force of a selection list upon the lands covered

thereby, and approves the Land Department practice on the subject. A reference to the decisions of the Land Department discloses several cases precisely in point here.

In *Northern Pacific R. Co. v. Fly*, 27 Land Dec. 464, the Railway Company had filed an indemnity selection of land for which a prior timber culture application had been tendered. The timber culture applicant failed to complete his entry, and thereafter the claimant Fly filed a homestead entry. Upon appeal from the decision of cancelation the Secretary of the Interior said:

“Counsel for Fly, in the argument of the case, refers to several decisions of the supreme court in which it is held that the condition of the land at the date of the passage of the act making the grant, or the definite location of the road, determines the company’s rights under the grant, even though the condition is afterwards changed, that is, if at the date of the act or at the time of definite location, the land is embraced in a homestead entry, it is not passed by the grant, even though the entryman thereafter abandons the land.

“These cases, however, all involve lands within the primary or granted limits, and if, for any reason, a tract within these limits does not pass because of a claim thereto existing at the time of the attachment of rights under the grant, the same

is forever excepted and the company must look to its indemnity limits for a tract in lieu thereof.

“Within the indemnity limits of the grants to aid in the construction of railroads, the rights of the grantee claimant attach only upon selection, and such selection may be made at any time when the land is free. The fact that such land is at one time not free and therefore not then subject to selection, does not preclude its subsequent selection. For administrative reasons it is deemed better that an indemnity selection proffered or tendered for land which is not free at the time should be rejected by the local officers, but this is a matter within the control of the Secretary, under whose direction the selections must be made. In many instances the prescribed practice requiring a rejection of selections proffered or tendered for land included in an existing adverse claim, was departed from by the local officers and the selections allowed to go of record notwithstanding such prior adverse claim, and this action of the local officers was acquiesced in by your office and by the department to the extent of permitting the selection to stand of record subject to the perfection of the adverse claim. The case at bar is one of this class and in departmental decision of August 11, 1894, it was held, as before stated, that ‘upon completion of entry by Kincaid, the company’s selection will be canceled.’ While not amounting to an approval of the selection, this was, in effect, an order permitting the selection to stand, saving only the rights of Kincaid, the prior adverse claimant; that is, it was a

direction that should Kincaid fail to complete entry of the land, the selection already allowed to go of record, would be recognized, if no other objection thereto appeared upon further examination. The reason for this action grew out of the fact that many years had elapsed since Kincaid had tendered his application, and it might have been that he had abandoned his claim to the land, or was otherwise unable to complete the same.

“This in nowise affects the holding that the status of the land at the date of proffering or tendering selection, should control the action of the local officers in rejecting the same or allowing it to go of record, but where, contrary to the practice adopted in the administration of these land grants, the local officers erroneously allow a railroad indemnity selection to go of record during the pendency of a prior adverse claim, it is within the authority of the Secretary to permit such selection to stand, and to give it his final approval upon the subsequent abandonment or other elimination of the adverse claim. This results from the fact that a railroad indemnity selection does not become finally effective until approved by the Secretary, and if at that time the land is free and the company is entitled to the indemnity, the fact that there was an adverse claim to the land when the selection was proffered or tendered constitutes no legal obstacle to the Secretary’s approval under the law.”

In the similar case of *Northern Pacific R. Co. v. Dean*, 27 Land Dec. 462, it was said:

“It would be inequitable as well as illegal to hold that a mere application to file, never completed, and under which no right is now being asserted, served to reserve the land, and thereby invalidate a selection of the land, in all respects regular as far as shown by the record before me, to the end that applications presented at a date subsequent to the selection of the land might take precedence over the selections.”

A controversy identical to the present was decided in *Dunnigan v. Northern Pacific R. Co.*, 27 Land Dec. 467. Dunnigan appealed from the rejection of his application, filed October 31st, 1887. The Northern Pacific had selected the land on December 17th, 1883, prior to the accrual of Dunnigan's claim. He alleged, however, that the tract was not subject to selection by the Railway Company, “for the reason that said tract was settled on by one Theodore Buschman in the spring of 1881, and has been continuously occupied and cultivated ever since. That said Buschman died, while residing on the claim, in February, 1884, that affiant purchased the improvements of said Buschman and made settlement thereon in February, 1884, and moved thereon March 4, 1884, and has resided thereon continuously and cultivated the same ever since.” The Secretary said:

“The privilege which may and should be thus accorded to the settler is personal to him, because no transferable right is acquired by settlement, inhabitancy, occupation, cultivation or improvement of the public lands, and therefore one who, after a railroad indemnity selection has been proffered or tendered and regularly noted of record in the local office, purchases the possessory claim and improvements of another, does not thereby strengthen the position resulting from his settlement upon the land or other initiation of claim thereto after such selection was so noted of record. He would be acting with full knowledge of the selection and his rights would be subordinate to the inchoate claim of the company thereunder. It follows, therefore, that the rehearing had in this case was unnecessary.”

The Dunnigan case was followed in *Southern Pacific R. Co. v. Cherry*, 27 Land Dec. 470, and *Northern Pacific R. Co. v. Coryell*, 27 Land Dec. 513.

In *Ross v. Hastings & Dakota R. Co.*, 29 Land Dec. 264, it was again held that a purchaser of the possessory claim and improvements of a settler upon land at the date of indemnity selection thereof does not by such purchase strengthen the position resulting from his own settlement upon the land at a date subsequent to the selection. To the same effect is *Hastings & Dakota R. Co. v. Sonnenberg*, 29 Land Dec. 554.

Upon the facts the case of *Tarpey v. Madsen*, 178 U. S. 215, 44 L. Ed. 1042, is in point, although it involved lands within the place limits of a railroad grant, instead of an indemnity selection. The railroad's map of definite location was filed on October 20th, 1868. At that time the tract was occupied by a qualified pre-emption claimant. That claimant, on May 29th, 1869, filed a declaratory statement alleging settlement on April 23rd, 1869. Afterwards he abandoned the land, and in 1896 the defendant Madsen filed a homestead entry therefor in the local land office, which entry was allowed, and after an appeal to the Commissioner of the General Land Office he received a patent. The Railway Company in the meantime had sold the land to the plaintiff. The court held that the case must be determined by the state of the record evidence in the land office and that as the pre-emption claimant's declaratory statement had not alleged settlement prior to the filing of the map of definite location, "its rights ought not to be defeated, long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation."

It may be argued that this decision is inconsistent with that announced in *St. Paul, M. & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. Ed. 941, but there is no inconsistency between the two cases. In the *Donohue* case Hickey, the original claimant, made settlement in March, 1893, filed homestead entry July 22nd, 1896, immediately after survey, and he and his heir continued to assert the rights so initiated until the filing of the relinquishment by his heir, pursuant to which Donohue entered the land under the Timber and Stone Act. The railroad's selections were not filed until several years after the settlement by Hickey. All these facts appeared of record, not merely by testimony taken in the Land Department, but by the homestead application and other documents filed there by the claimants. It was held (a) that the settlement by Hickey exempted the land from selection by the railroad, and (b) that the statutory right of Hickey's heir to relinquish, and of Donohue to make application for the land, prevented the attachment of the Railway Company's selection at the time of the relinquishment.

In the *Tarpey* case the court made it clear that had it been dealing with a controversy between

the original pre-emption claimant and the railway company, "every intendment should be in his favor in order to perfect the title which he was seeking to acquire." The court continued:

"But when the original entryman, either because he does not care to perfect his claim to the land, or because he is conscious that it is invalid, abandons it, and a score of years thereafter some third party comes in and attempts to dispossess the railroad company (grantee of Congress) of its title—apparently perfect and unquestioned during these many years—he does not come in the attitude of an equitable claimant to the consideration of the court."

Giving full weight to both cases, the result is that in a contest between a railway company and an entryman himself, or those who have by statutory proceedings succeeded to his rights *by relinquishment*, the individual claimant's rights will be considered as having attached at the date of actual settlement, but that as between the railway company and any other, the question must be determined by the state of the record made between the railway company *and that other* in the land office, and since, in the present case, O'Donnell abandoned the land without ever placing any record evidence of his alleged settlement of record in the

land office and has never since asserted claim thereto, the *Madsen* case is decisive authority for the proposition that the railway company's rights are not to be defeated by "fugitive and uncertain testimony of occupation" on his part. And this contention is the more forcible when it is borne in mind that O'Donnell himself refused in his affidavit for McPhee to state what lands he had claimed, but merely swore that, without being able to state the description of the land claimed by him, it was what he acquired from Cole and sold to Thurston.

This is a suit in equity, and one of the maxims of equitable jurisprudence is that when the equities are equal the first in point of time shall prevail. That principle has been applied in the authorities already cited, holding that in controversies affecting the public lands the first in time is the first in right. The only argument that can defeat its application here is that when the original selection list was filed it failed to attach to the land because of O'Donnell's claim, and that when O'Donnell's claim was terminated the selection list had no existing vitality which would allow it to attach to the land.

Plaintiff's Claim of Title Cannot Prevail in any Event to More Than Forty Acres of the Land in Controversy.

In this and the preceding subdivisions of the argument, we waive, for the time being, all questions arising under the conflicting surveys, and treat the case as though there had never been any survey, except the official one. In another portion of the argument we have endeavored to show that there was no settlement or subsisting claim to the land by O'Donnell, at the time of the filing of the selection list. We will now undertake to demonstrate that even though O'Donnell had a claim to the land on May 9th, 1902, it covered only one forty acre tract of the land now claimed by McPhee.

Little need be said on this question, in addition to what the court has already said in the memorandum opinion of July 19th, 1921:

"The cabin was built by Cole and O'Donnell, occupied by O'Donnell and was upon the southwest quarter of the northwest quarter of Section 12 at the time the scrip was filed; that O'Donnell conveyed his right to his claim, *including the southwest quarter of the northwest quarter* to Thurston, and that Thurston conveyed his right to the *southwest quarter of the northwest quarter* to Beebe

is undisputed. The fact that each filed upon their claims in harmony with this division is conclusive, and Thurston testifies that 'being a quarter of a mile back from there I drops one forty and takes another forty.' *The forty that he dropped was the forty that Beebe obtained*, on which was the cabin, and the forty Thurston took was the forty he got from Beebe."

We have never comprehended why the trial court, although finding a privity between O'Donnell and McPhee as to only forty acres of the land in controversy, should have decreed the entire 120 acres to the plaintiff.

The claim of C. C. Cole is described by Al Small, the only witness on the subject, as consisting of the four east forties of Section 11, by the Galbraith survey (Tr. 239). Those four forties are partly included in the four west forties of Section 12, by the official survey. Cole sold his improvements and right of possession to Dan O'Donnell in October, 1901. That, of course, was all he could sell, the homestead claim not being susceptible of transfer. *Bailey v. Sanders*, 228 U. S. 603; 57 L. Ed. 985. The transaction, however, constituted indisputable evidence of Cole's abandonment of the claim. *Love v. Flahive*, 205 U. S. 195; 51 L. Ed. 768.

It remained for O'Donnell to initiate his own homestead claim, and to define its boundaries, which might or might not coincide with those of Cole. (See Land Office Decisions already cited at page 87 of this brief.) It might possibly be assumed from the testimony of Small in the present record that O'Donnell claimed the same land as Cole, but Small did not undertake definitely to describe the O'Donnell claim. O'Donnell himself said his claim consisted of what became the Thurston homestead, but assuming that the evidence of Beebe overcomes this, the most that can be said, and the most the trial court found was that only the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 12, was common to the claims of both O'Donnell and McPhee. This is the forty of the O'Donnell claim which Thurston, his immediate successor, is said to have traded to Beebe for the forty in Section 1, on which Thurston built his house. The other three forties of the O'Donnell claim, lying directly east of the present McPhee claim, passed from O'Donnell to Thurston, were never disposed of by him, and were subsequently covered by the patent of the United States. That patent was issued on the sworn testimony of O'Donnell, and of most, if not all the witnesses who have

since been relied upon by McPhee. It is therefore submitted that even should the court conclude that O'Donnell had settled upon and initiated a claim to any of the land in controversy at the time of the filing of the selection list, that claim cannot now operate in favor of the plaintiff, except to the extent that it coincides with the plaintiff's present claim; and as the coincidence is limited to the forty acre tract containing the cabin, viz., the Southwest quarter of the Northwest quarter, Section 12, it follows that the plaintiff's relief must in any view of the testimony be limited to that one tract.

In View of the Conflicting Surveys it is Certain that if O'Donnell Claimed Any Part of the Present McPhee Tract in 1902, He Claimed Land in Section 11, and Not the Land Selected by the Railway Company in Section 12.

Plaintiffs' Exhibit 1, as marked by the surveyor at the court's request (Tr. 255-256) and the certified copy of the field notes from the Surveyor General's office (Defendants' Exhibit F) show that the four west forties of Section 12 of the official survey contain about two-thirds of the four east forties of Section 11, by the Galbraith survey. The latter was the only survey O'Donnell knew.

The question arises: Assuming that O'Donnell actually had a settlement right, located in Section 11, could it later be asserted to any part or all of Section 12, when the official survey was drawn to include in Section 12 a part of what had formerly been Section 11?

The Railroad Selection List filed May 9th, 1902 was unequivocal in claiming "that which will be when surveyed the [West half of the Northwest quarter and the Northwest quarter of the Southwest quarter of Section 12." (Defendants' Exhibit "A".) Regardless of the shifting of the survey, the Railway Company thus bound itself to take whatever land might fall within the description stated. The predecessor of the plaintiff at the same time is said to have been specifically describing and claiming land distinct from that claimed by the Railway Company, under conditions as then known. About one-third of what was then known as the east line of forties of Section 11 by the Galbraith survey still remains a part of the east line of forties of Section 11 by the official survey. We submit that it is more reasonable and just in such a case for a settler's claim to follow the specific description which he has

publicly advertised to the world when the lines of the survey shift, than to allow a successor of his to take land of an entirely different description, as to which an unequivocal *bona fide* claim has in the mean time arisen.

The question is admittedly difficult of solution, but some indirect light is shed on it by the authorities. Chief Justice White in the *Donohue* case, *supra*, spoke of the possibility of confusion and conflict under the law allowing pre-emption and homestead settlements, in advance of survey:

“As under both the pre-emption and homestead laws, whether the settlement was made upon surveyed or unsurveyed land, the law did not make it necessary to file or record a claim in respect to the land until a considerable period of time had elapsed after the initiation of the right by settlement. It necessarily came to pass that controversies arose from rights asserted by others to land upon which a settlement had been made, but as to which no exact specification appeared upon the records of the land office of the location and extent of the land claimed.”

He went on to speak of the settled administrative rule “that the notice effected *solely by improvements* upon the land is confined to land within the particular quarter section on which the im-

provements are situated," and that in cases where the settler's claim embraced "not only land within the legal subdivision on which the improvements had been placed, but contiguous land lying in another quarter section, the ruling has ever been that any conduct of the first settler adequate to convey actual or constructive notice to a subsequent settler that the claim had been initiated not only to the land upon which the improvements were situated, but as to contiguous land, even though in another quarter section, sufficed to preserve the rights of the first settler."

The present case being of the latter class, that is, one involving a claim to lands in different quarter sections, it was necessary for the claimant to give "actual notice to an intruder of the extent of the settlement claimed." Any notice given by O'Donnell must have referred to land then differing entirely from and now corresponding only in part to the lands selected by the Railway Company.

By the pre-emption laws (now repealed) specific provision was made for conflicting settlements upon unsurveyed lands. Section 2274, Revised Statutes (U. S. Comp. Stat. 1916, p. 5324) provided

that if whenever two or more persons settled upon unsurveyed lands it should be found after survey thereof that they had settled upon the same legal subdivision, such settlers might make a joint entry of the lands, or that one settler might perform the statutory requirements for all, after having contracted with the other settlers to convey to them their proper shares. There is no similar provision in the homestead laws, but by administrative rule of the Land Department the practice is to allow conflicting rights acquired prior to survey to be adjusted through agreement of the parties. 6 L.D. 826; 7 L.D. 3; 8 L.D. 536; 18 L.D. 335; 13 L.D. 19; 20 L.D. 490; 21 L.D. 224; 18 L.D. 297; 28 L.D. 412; 28 L.D. 510. It is also the rule of the Land Department that rights by settlement cannot be acquired or maintained on different tracts at the same time, 8 L.D. 96, 200, 461; 9 L.D. 63 and that settlement prior to survey, marked by distinct boundaries, cannot be enlarged to the injury of subsequent settlers. 1 L.D. 414, 431. In the cases last cited the rule is said to be that when "a claim is located upon the ground before survey, and other claims are afterwards made and located with reference thereto, the party

first locating and making known the extent of his claim will not be permitted to enlarge the same to the injury of subsequent locators, whose claims have been made to conform to such first location."

When it was found by McPhee, or his predecessors, that Section 11 claimed in part by them, had been shifted to the west by the official survey, reason and justice would seem to require that their claim should shift with the survey. If there was no other occupant or claimant of the land newly covered by their description, no one would be harmed. If there was an adverse claimant, the conflicting rights might have been adjusted through agreement of the parties under the settled practice of the Land Department, or by a court of equity, if agreement were impossible. Certainly, such a procedure would have been more equitable than to allow the claim to be shifted in the opposite direction from which the survey moved, to the injury of one who had by a claim of record in the Land Office, described his claim once and for all as definitely lying in Section 12, wherever Section 12 might fall.

But if this reasoning be incorrect, it is at least true that the plaintiff can claim no more of the

land now in Section 12 than his predecessor, O'Donnell, claimed when it was part of Section 11. The rules of equity are not circumscribed by survey lines. It was only lands to which an adverse claim had attached or been initiated that the Railway Company was not allowed to select. Conceding that O'Donnell had a settlement claim, it covered only about two-thirds of the forty acre tract to which this controversy has been reduced. If his successor McPhee prevails at all, it can therefore be only as to that distinct land in the present Southwest quarter of the Northwest quarter of Section 12 which once was included within the Section 11. The exact description of the coincident land may be obtained from the field notes of the official survey, which are in evidence as Defendants' Exhibit "F."

The decree should be reversed.

Respectfully submitted,

THOMAS BALMER,

*Solicitor for Great Northern
Railway Company.*

CLINTON W. HOWARD,

*Solicitor for Bellingham Bay
Improvement Company.*

United States Circuit Court of Appeals

For the Ninth Circuit

No. 3952

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Appellees

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
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NORTHERN DIVISION

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

The facts upon which this cause is predicated will be found concisely and accurately stated in the decision of the District Judge (Rec. 212-221). All

the detail of the first sixty-five pages of Appellant's brief, are epitomized in that decision; not a material fact missing, and each conformable to the evidence. However, appellant has injected much comment and argumentative matter it may be necessary to notice when combatting its deductions.

The prime facts, of settlement by Cole, who was succeeded by O'Donnell, who was succeeded by Thurston, who was succeeded by Beebe, who was succeeded by McPhee, thru a consecutive chain of grants, are not in dispute. The fact that Thurston transferred the O'Donnell settlement to Beebe is conclusive, for each transaction was followed by each taking possession, and making their filings conformably to their trade. That both Thurston and McPhee claim thru O'Donnell is quite certain.

Thurston made application to enter his land Feb. 6th, 1906 (R. 164); Beebe filed Feb. 6th, 1907, relinquished Sept. 23rd, 1909; McPhee filed Sept. 25th, 1909; succeeding Beebe. Beebe failed to show his succession from Thurston; Thurston in turn never informed the Land Department he had transferred to Beebe.

During the period from July, 1910, to the passing of patent to Thurston in 1912, the Land Depart-

ment had both claims pending before it. The claims of McPhee to priority over Thurston were uncontradicted, and undisputed. The Land office disposes of these by saying McPhee "did not protest Thurston's claim for allowance." (R. 81.)

The land sought by Thurston was entirely separate from McPhee's. No one has ever disputed the fact that the actual situs of the land claimed by McPhee, is the identical land entered by O'Donnell, or that the land occupied by O'Donnell was the identical land transferred by Thurston to Beebe, and on to McPhee.

The question resolves itself to this: Shall McPhee be penalized and deprived of his honest purposes, because Thurston represented himself as owning rights to which he had no claim at the time he submitted his proof.

Nor can we believe the evidence given in the Thurston hearing, an *exparte* proceeding, conclusive against the rights of strangers, or decisive of a question of fact as against strangers, or preclude the right of witnesses to subsequently show they were misled to speak of a different piece of land than the one effected. This applies equally to O'Donnell himself; when approached for an affidavit, not knowing the

description of the land, he fell in with the paper presented to him as containing the description by survey.

When, however, he is called for detail of facts, he says he does not know the numbers of the new survey, but what he sold to Thurston was what he actually settled upon and nothing else. There are no irreconcilable discrepancies in any of the witnesses; those whom appellants are quoting—Leavitt; Smith; Steiner; and Thurston—were all available to appellant at the trial—but not called; Thurston was on the stand for the appellant, (R. 261), and was questioned about respondent's residence, but made no denial of having sold to Beebe, and had made use of the cabin of O'Donnell after parting with its ownership, for proving his homestead entry.

THE FACTS BY STEPS.

The logical order of this cause is the historical steps taken in the order of their occurrence.

The first step was taken by C. C. Cole, who employed the witness Small to erect a dwelling on the land with the declared intention of making a homestead. This was in August, 1901. (R. 234.) Cole sold the improvements to O'Donnell in October, 1901,

who at once settled on the land intending to acquire it as a homestead. He finished the cabin, posted notices on the land and house describing the land (as accurately as practicable) and declaring it to be his homestead. He built a house, ate and slept there, cleared some land, and expended money and established a residence (Rec. 245; R. 140; and lived there in 1902—Id, and 1903, R. 141); his cabin was furnished very comfortably for a homestead (Rec. 144, 145, he established a residence Id 147, 149, 150, O'Donnell was occupying the land as a settler, residing there on the day the Railroad Company made its selection R. 152, it was his home Id 236. The notices described the land as in Sec. 11 (old survey) R. 241). It was occupied in 1904 Id 244 as a homestead.

That O'Donnell settled on this land and resided on it for the purpose of making it a home, under the homestead laws, is beyond doubt. That his settlement was prior to the selection by the Railroad Company is as certain as the dates in the calendar; that he was living there at the time the selection was filed is not questioned; that his settlement was alive in 1904 is equally true.

The land was subject to settlement and his settlement took it out of the classification of Public Land.

LAND WAS NOT OPEN TO SELECTION.

Unreserved land, the title to which rests in the United States, whether surveyed or unsurveyed, is subject to entry for purpose of settlement. Prior to 1880, the rights of the settler date from filing of a declaratory statement with registrar and receiver of the local land office, but since 1880 the rights of the entrymen date from the time of settlement. This difference of time does not alter the principle announced by the Supreme Court in this language:

“In no just sense can land said to be public lands after they have been entered at the land office (settled upon) and a certificate obtained. If public land before the entry, after (settlement) it is private property.”

Wisconsin Etc. R. R. Co. vs. Price 133 U. S. 506.

Where one has established settlement and erected a dwelling and maintained his possession, he initiates an inceptive right which was the commencement of title.

Choteau vs. Pope, 12 Wheat, 588.

Hoofanale vs. Anderson, 7 Wheat, 212.

Applied to the case at bar, the settlement of O'Donnell and respondents grantors withdrew the land from entry or settlement by any other, and se-

gregated the quarter section from the public domain. The legal title remained in the government but as against all others, except the United States, they were the lawful possessor clothed with an inceptive title.

Sturr vs. Beck, 133 U. S. 547.

Bunker Etc. Co. vs. U. S. 226, U. S. 550.

Upon this inceptive title they could maintain suits in equity, or actions at law to obtain redress for a violation of possessory rights, they might "treat the land as their own."

Russian American Packing Co. vs. U. S. 199, U. S. 577.

Shiber vs. U. S. 159 U. S. 497.

Gauthier vs. Morrison 232 U. S. 457.

With this right of title attaching and living in the entrymen from the date of his settlement, and surviving in his heirs and grantees, we advert to the statute upon which the defendants claim is based. This statute gives the defendant the right "*to select from the public land of the United States, an equal quantity of land not reserved, and to which no adverse right or claim shall have attached or been initiated at the time of making such selection.*"

Act Aug. 5, 1892, 27 Stat. 390.

The grant of this statute carries two limitations, *first* the Railroad Company could not select land to which any adverse right had been initiated; *second* the land department could not bestow or grant land to the Railroad Company, on its selection to which an adverse right had attached or become initiated: It was no more in the power of the Secretary of the Interior to convey the ownership of this land to the Railroad Company by issuing a patent, than it was in the Railroad Company to select the land in the first place.

If the language of the Supreme Court in the cases cited in our brief mean anything at all, it is that thing; we let that meaning be the guide to our conclusions.

If the land, by virtue of a settlement "was not subject to selection by the Railroad Company," the proceedings in the land department could not make it so. If it ceased to be *public land* by reason of the settler having initiated a homestead, and was not subject to selection by the Railroad as lieu land for the same reason, it was open to filing by the settler, and the officers of the Land Department erred in refusing such filing. It erred in holding the land subject to selection.

Ard vs. Brandon, 156 U. S. 537.

Svor vs. Morris, 227 U. S. 524.

Osborn vs. Frayseth, 216 U. S. 571.

The initiated homestead attaching prior to the selection, thwarts the attempt, and bars afterward the effort to select. Such land never does become subject to selection as against the settler—or subsequent settlers if the first abandoned; for the very good reason it could not be extended to include such land in any event.

Hastings Etc. R. R. vs. Whitney 132 U. S. 357.

Kansas Etc. R. R. vs. Dunnmeyer 113 U. S. 629.

N. P. R. R. vs. Trodick 221 U. S. 209.

“The decisions of the Land Department on questions of law, are not binding on this Court in any sense.”

Hastings Etc. R. R. vs. Whitney, supra.

That a settler may sell his improvements and clear the way to his successor is well established.

In the Donohue case, one Hickey had settled upon unsurveyed land, subsequently, and prior to survey the St. Paul M. & M. Ry .Co. made indemnity selection under the same statute, and claim involved at

bar, not only upon the particular tract upon which Hickey had placed his improvements and established residence, but “upon all the unsurveyed land contiguous thereto, which under any contingency could have been acquired by Hicky in virtue of his settlement.” Substitute the name of Hicky for O'Donnell and dates of filing, and the case at bar is before us.

A contest in the Land Department resulted in recognizing Hicky as having initiated a right which upon his death passed to his heirs, who filed a declaratory statement. Shortly afterward the heir relinquished in favor of Donohue, who filed under the timber and stone act. The Department rejected this application and finally awarded patent to the railway company on its selection. Donohue sued:

“The ruling rejecting the Donohue claim and maintaining the selection of the railway company, was erroneous as a matter of law; since by the terms of the act of August 5, 1892, c. 382.27. Stat. 390, the railway company was confined in its selection of indemnity lands to lands non mineral, not reserved ‘and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection.’ When the selection and supplemental selection of the railway company was made the land was segregated from the public domain, and was not subject to entry by the railroad company.”

St. Paul Man. & Man. Ry. Co. vs. Donohue,
210 U. S. 21-40.

The question came again before the court where the facts show, the Ry. Co. in 1883 filed an indemnity selection, but neglected to comply with regulations of the Land Department, and the selection was rejected; it remained pending in the Department by successive appeals until October, 1891, when it was finally rejected.

Another selection of the same land was filed which on March 29, 1897, was approved by the Secretary of the Interior and the tract certified under the grant, the certification being treated as the equivalent of a patent. In 1888, and while the first selection was pending, claimants' occupancy was begun and was continuous and covered the interim between the rejection of the first and filing of the second selection:

“Following the final rejection of the first selection there was an interval of six days in which the land was open for settlement under the homestead laws. So there can be no doubt that by his residence and occupancy during that interval he initiated and acquired a homestead right. He was not disqualified by reason of what he had done before and of course it was not necessary that he should go through the idle

ceremony of vacating the land and then settling upon it anew * * * The second selection came after his homestead right had attached and therefore was subordinate to it * * * as between conflicting claims to public lands the one whose initiation is first in time is to be deemed first in right * * * but it is contended he lost his claim by not asserting it in due time at the local land office. It is true the Act of May 14, 1880, 21 Stat. 141 c. 89 sec. 3 fixed three months from the date of settlement within which the claim should be asserted at the local land office and *defendant did not conform* to this requirement, but *that is not a matter of which advantage can be taken* by one who stands in the shoes of the railway company. * * * The statute does not contemplate such a default shall inexorably extinguish the settler's claim, but only that the land shall be awarded to the *next settler* in order of time who does so assert his claim; * * * A failure to file an application within three months after settlement forfeits the claim to the next settler in order of time, but such a default is not one that can be taken advantage of by a railway company; we regard that ruling as resting upon a proper conception of the statute, * * * Had the real facts been disclosed—viz: that defendant was residing upon and occupying the land, in virtue of a lawful homestead settlement, antedating the selection, it would have been the duty of the Secretary of the Interior to disapprove the selection * * * but the real facts were not disclosed. On the contrary, it was claimed and alleged by the agent, in making the selection, that the land was then vacant and unappropriated, and on that representation the

Secretary's approval was given. Thus the title was wrongfully obtained by one who was not entitled to it, and another who had earned the right to receive it was prevented from obtaining it, when subsequently he came to assert his right before the Land Department."

Svor vs. Morris 227 U. S. 524-529.

Another conflict arising from the same selection last mentioned, the settler's application for a homestead entry was rejected on the same grounds, but after appeal taken by the settler, and the Secretary of the Interior pointing out the affidavit was defective; and after the court had discussed that feature as raised too late to diminish the settler's right it is said:

"But assuming that the application in its then form was defective, it is of no legal consequence in determining the validity of the title of the plaintiff in error. This was a plain common law action of ejectment. Plaintiff must recover if at all on the legal title. The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company under its grant, was to initiate a homestead right. That settlement and possession continued from the time it was first made and when * * * the railroad or its successors attempted to select that land as indemnity land, the land in question was in the actual occupancy of Froyseth, claiming it as a homestead. *It had by such settlement been segregated from the land subject to selection,*

and in a contest between such a homesteader and those claiming under selections subsequently made of lieu lands, the claim of the former is the better claim. * * The rights of one settling in good faith for the purpose of claiming a homestead, relates back to the date of settlement. *

* * It is urged that the mere fact that there was no record evidence of a homestead claim when the selection was made, was enough to give efficiency to that selection and vest the legal title under the patent thereafter issued. But this is answered by what we have already said namely, *that if at that date this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim it as a homestead, the land had ceased to be public land and as such subject to selection as lieu land.*"

Osborn vs. Froyseth 216 U. S. 571-576.

Lands granted to railroads, whether classified as lands in place or as lieu lands exclude from those in place, and preclude taking in lieu, any land, where "either pre-emption or homestead rights have attached or been initiated."

"It was not the intention of Congress to open a controversy between claimants and the railroad company as to validity of former claims; it was enough that the claim existed."

Whitney vs. Taylor, 155 U. S. 85.

It was not necessary appellants had notice of the homestead entry. That fact the selector must de-

termine at his hazard. Though he search and does not find, he gains nothing for his innocence. If the land is occupied ever so obscurely, the selector must yield; the occupant may have his residence in a hollow log, and his particular 160 acres lie in four directions from the residence. The quantity has been "attached" by an "initiated" homestead; all subsequent attempts to take must beware. Where public lands have been "entered" regardless of the form of entry pursued, so long as the means were lawful, they become segregated.

"The rule is well settled by a long course of decisions, that when public lands have been opened to private settlement, a person who complies with all the requisite necessary to entitle him to a patent, is regarded as the equitable owner, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another is void."

Wirth vs. Branson 8 Otto, 118. 25 Law Ed. 86-87.

All these cases are resolvable on the proposition that lands to which initiated rights had attached were "open as matter of law" and not subject to the grant if in place, or to selection as lieu, though the occupancy was not known at the time. Further, the granting of a patent in either, created a trust in which

the settler was *cesti qui*, and the patentee, trustee.
This is the very language of

Svor vs. Morris, Supra.

Ard vs. Brandon 156 U. S. 537.

Appellants weave themselves into the belief Thurston and McPhee were contestants; parties to the same proceedings conducting a trial before the Land Department, over disputed interests.

No such controversy arose—neither was in any way disputing the other. Neither sought any land sought by the other.

The only thing that happened was Thurston proved the entry of O'Donnell to carry a claim to lands not entered by O'Donnell—disclaiming all claim to any part of what O'Donnell had actually entered.

These things are shown by proceedings in the Land Department.

Omitting mention that *Thurston was neither owner of the improvements nor seeking their situs*; Appellees were not parties to the proceedings.

IN THE LAND DEPARTMENT

The extent to which the Court goes in reviewing proceedings in the Land Department is thus stated:

“It is only when those officers have misconstrued the law applicable to the case as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or, where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in proper proceeding, interfere and refuse to give effect to their action * * And where fraud and misrepresentations are relied upon as grounds of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the department.”

Quinbey vs. Conlan, 104 U. S. 420.

Putting ourselves within this rule, not wishing to depart from it, are we bound by the argument that because the Thurston case had been referred to in a brief submitted by Mr. Cannon, we thereby became bound as parties to that action? The statement of the proposition ought to be its answer. Mr. Cannon was simply asking that the evidence produced in the Thurston case had established the entry of O'Donnell and created a prior right over the railroad selection, and inviting the department to hear evidence of the

witnesses as to the actual location and ownership of the initiated right.

He was asking that witnesses be heard to show the true location of the situs of the controversy—the location of the improvements. It was true witnesses had testified such buildings were upon the N. W. $\frac{1}{4}$ of Sec. 12, but they had not testified they were upon subdivisions claimed by Thurston.

It was the possession and occupancy of the improvements that carried the right to acquire the land.

THURSTON'S CLAIM NOT A CONTEST WITH RESPONDENTS.

The fallacy of the reasoning is pointed out by reference to a case where the principles parallel; though involving mining locations, no distinction can be made in the principles discussed. Claimants to a mining lode had waged a contest with the government and received a patent; it is held such contest and patent were not binding upon a claimant asserting prior rights. This language is used:

“A judgment is binding upon the parties to the proceeding in which it is rendered and upon their privies. The parties to the judgments

of the Land Department by which it allowed the entries of the lode claims in the case of the gold mining company were the United States and the owners of those claims. No other parties had or claimed any interest in the land at the time those entries were made. The judgments and the patents accordingly bound and estopped these parties and their subsequent assignees. They estopped all parties who initiated claims * * * under either of the parties to the proceeding subsequent to the judgments of the Land Department * * * Two of these parties, the lode claimants and the United States, were parties to the proceedings, and were estopped by the judgments and the patents. One of them was not a party to any of the proceedings, to the judgments, or to the patents, and upon familiar principles, was neither bound by them nor estopped by them from presenting and proving according to the established rules of evidence in trials under the common law, the fact that no discoveries had been made on the lode claims before the location of its tunnel site, the fact essential to the validity of its claim upon and interest in the land. * * * Not only was the claimant of the tunnel site not a party to the proceedings in the Land Department * * * but it was neither required to become such a party nor to submit its claims and interests in the lands to the adjudication of that department at that time."

Unita Tunnel Co. vs. Creede, Etc. Co., 119
Fed. 164-167.

This rule, announced by Judge Sanborn, at Circuit, was taken to the Supreme Court of the United

States, where the case was affirmed, the parties being reversed.

196 U. S. 337; 49 L. Ed. 501.

That property rights are lost in an action to which the owner is not a party has so long been condemned by our civilization, we do not believe an exception exists in behalf of a ruling of the Land Department.

THE EVIL OF SUCH A RULING

To permit such ruling is to say that a thief may steal your purse, exhibit it to a judge, make oath it belongs to himself, and tell the owner, "Since I have shown this and claimed it, without saying anything about who it belonged to, you have no right to it." That is the ultimate logic of appellant's argument, but we do not believe the court can send it out as a good precedent to follow.

If there had been a contest between parties before the Land Department where the issue was "Who owns the improvements?" and each side had called witnesses and cross-examined, the ruling might hold with defendants' contention, and as between them be final; but would it prevent a stranger from showing

neither of the parties were right? Or, coming closer, suppose after ruling made but while the jurisdiction attached, it is shown absolutely that the losing party in truth owned the subject matter and was in possession; and hearing, and admitting its truth, still adhere to the error? These are the questions in this record. While the cases of both Thurston and respondents were pending in the Land Department, proof was presented uncontradicted fixing the location and ownership of O'Donnell's improvements. It was the plain duty of the department to order an investigation to see who owned the improvements and where located, and that by the proper examination of witnesses; affording witnesses the opportunity of correcting discrepancies in affidavits and previous statements, where apparently contradictory statements had been made.

As the record stands, no juggling of words; no garbling of testimony; no mingling of logic and sophistry obscures the facts of O'Donnell's entry, under Cole, O'Donnell conveyance to Thurston; he to Beebe, and the latter to respondents. After parting with the entry Thurston made claim to distinct land; he indicated his grantee's rights as his own to procure title to such distinct lands; of these doings re-

spondents were ignorant; and not party; they had acted in good faith; taken all possible steps in the Land Department; and been denied the right of homestead because the department decided not to correct the error.

The claim that respondents would be bound by the testimony in the Thurston case, or be under the necessity of protesting Thurston's claim, could only rest upon the assumption that the notice given by Thurston of his intention to make final proof bound the world, and bound respondents. The vice of the argument lies in the fact that Thurston's notice did not affect any portion of the land sought, occupied or claimed by respondents, nor did it disclose that he was seeking to appropriate to himself the benefits and advantages springing from their property. The same may be said of the field investigation. We take it "field investigation" means that some agent of the Land Department visited Thurston's premises. If he did do so, and went searching for the original improvements upon which the validity of the O'Donnell entry rested, he found living therein these respondents. It is an uncontradicted fact they were residing upon and using the O'Donnell house at the very time Thurston was making his proof, and this "field in-

vestigation'' was taking place. Further, the strongest possible testimony it was within the power of anyone to bring to the Land Department was the rights springing from actual possession. A proper investigation would have revealed this possession, would have shown the O'Donnell improvements forty rods away from Thurston's claim. It was a fact the Land Department could not ignore, nor wipe out of existence by a mere fiat, or blindly refusing to see. Its attempt to do so is error. Evidently this field investigation had reference to whether there had been an original settlement made by O'Donnell without regard or attempt to define the subdivision upon which the improvements existed. Equally potent is the statement of O'Donnell that he did not know the lines of survey as they were finally located on the ground, but he did know and all he attempted to do was to assign to Thurston the rights to the ground which he in fact occupied, be their sectional subdivisions what they may. The exparte affidavit which he makes for Thurston is readily understandable from the fact that he was simply trying to confirm the sale which he had made to Mr. Thurston, no doubt believing, on the latter's presenting testimony to the Land Department, that Mr. Thurston was seeking to obtain the

same lands which O'Donnell had occupied; *ignorant of the fact that Thurston was not seeking that property*

IV.

It is quite true that respondents seek their title here, upon the ground that a homestead entry had attached to the land through O'Donnell's improvements, and homestead claim, to which they had become successor; and by reason of which the land was exempt from selection. Whether Thurston may hold what he acquired from the railroad through cancellation of its selection is foreign to the issue. That the appellants may invoke the equitable side of the court and recover the land of Thurston is supported by very able authority, to which they are in no wise strangers.

When the Land Department decided that O'Donnell had initiated a homestead right, existing at the time the selection was placed, there was no longer a contest between the parties as to its superiority or priority. That question was settled.

Donohue vs. St. Paul M. M. R. R. 210 U. S. 21.

When O'Donnell's entry was established, the question then before the Land Department was,

“Who was entitled to the O'Donnell succession?” As between the railroad company and Thurston it became conclusive it might have been one or the other, but the decision binding between them would not be a limitation upon respondents' rights as the prior transferee of the O'Donnell settlement from Thurston; nor was it within the legal power of the Land Department to say that because, as between the conflicting claims of the railroad company and Thurston it had decided the latter to be the owner of the O'Donnell improvements, respondents were concluded from establishing their rights as the successor of O'Donnell through Thurston.

Unita Tunnel Co. vs. Creede Supra.

V.

Further, as to the owner of the improvements having the superior right to acquire the land: It is well settled both by the plain language of the statute and an unbroken line of decisions that the improvements upon which the homestead claim arises, (and without which it could not exist) must be located upon some part of the land sought to be acquired, or there must have been good faith belief on the part of the claimant that such improvements were upon the

lands sought, and in fact were so close to it as to justify the legal conclusion that the belief was founded in good faith.

Ferguson vs. McLaughlin, 96 U. S. 174.

Donohue vs. St. P. M. & M. R. R. Supra

Guytown vs. Prince, 2 Land Dec. 143.

Re. Harten 10 Land Dec. 130.

Re. Parker, 8 Land Dec. 547.

Re. Bowen, 41 Land Dec. 424.

It is very apparent Thurston was not seeking to recover the land upon which the improvements were made by O'Donnell. He says, "I drops this 40 and takes up another where my house stands." He had long ago parted with the improvements and location made by O'Donnell; he stood before the Land Department with the declaration that he was seeking to recover for improvements made upon other lands — of itself, notice sufficient to arouse suspicion that he had not then the improvements made by O'Donnell, and if he concealed the fact that he had entirely parted with their ownership, and the rights which went with them, his craftiness does not alter the rules of law, to defeat the true owner.

The foregoing authorities are all cited with approval as the law and controlling the principles for

which we contend in, and are expounded in—

Great Northern Railway Co. vs. Hower,
236 U. S. 702.

This last case went from the Supreme Court of the State of Washington. It is decisive of the issues presented here. We invite the court to read and apply the authorities there cited both from the Land decisions and the Supreme Court of the United States. If the ruling in that case, favorable to appellant, who was plaintiff, its converse must be true and respondents' contention upheld here.

In *St. Paul M. & M. Ry. vs. Donohue*: That case was based upon the identical script involved in section 44 (at bar). Donohue was the successor of the original entryman. The Land Department decided that the script location intervened upon the filing of the relinquishment of the first settler, to the exclusion of his grantee. The Supreme Court passing upon the point says:

“The Railway Company was confined in its selection of indemnity lands, to lands, non-mineral—not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of making such selections.”

Subsequently the court, in more vigorous terms, said:

“The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company, under its grant, was to initiate a homestead right; that settlement and possession continued from the time it was first made, and when * * * the railroad company, or its successor in title, attempted to select that land as indemnity land, the land was in the actual occupancy of Forseyth, claiming it as a homestead. It had by such settlement been segregated from the lands subject to selection * * * the rights of one settling in good faith for the purpose of claiming a homestead relates back to the date of settlement * * * If, at that date, this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim as a homestead, the land had ceased to be public land, and as such subject to selection as lieu land.”

Osborn vs. Froyseth 216 U. S. 571-576.

A survey of the authorities discloses a uniform rule; that where settlement has preceded the selection of land by railroad companies, and the granting to such companies of lands in place, under the original grant, lands *actually occupied* are excepted from the grant, or the selection as the case may be. Where a settler had occupied public lands within the odd numbered section granted to the Northern Pacific Railroad, and while occupying the property, after the grant was made, he assigned his improvements

to another, and the other applied for patent; after the land had been surveyed, it was held that the latter was entitled to acquire the land, over any claim of the railroad company, though its line of road was definitely fixed at the time the latter obtained possession from the original settler.

N. P. R. R. Co. vs. Trodick 221 U. S. 209.

Inasmuch as the settler's rights begin with the original settlement, and he has a right to settle on unsurveyed as well as surveyed land, it must follow that neither the original survey, nor the subsequent adjustment of such a survey, can limit his right to acquire the title. It would seem, and is conclusively shown, that he can take the land he occupies, when the survey is made, whether such survey places it in one or another section. Adjustments and readjustments of surveys do not move the surface of the ground. The ground remains stationary, and what is occupied never leaves the power of the settler to take, nor abridges his power, either to take or transfer.

There is no statute, nor are we advised of any decision of the United States Supreme Court, or the appellate courts, restoring to the railroad companies, or vesting them with the right to take in lieu, lands

upon which a homestead right has been initiated. These lands always remain open to the *next settler*.

Reviewing legislation making donations to the railroad companies, without exception the reservations are identical in meaning if not in language, and have been uniformly so construed. The grant in aid of the Northern Pacific R. R. which may be taken as an example provides that it should take every alternate section,

“not reserved, sold, granted or otherwise appropriated and free from preemption or other claims, or rights at the time the line of road is definitely fixed.”

Under the grant of indemnity lands, and the statute under which the defendant claims title, the selection was limited to

“Land not reserved and to which no adverse right shall have attached or been initiated at the time of making such selection.”

Both these statutes accomplish the same result and have been repeatedly analyzed by the Supreme Court of the United States.

In a case which arose under the original grant to the Northern Pacific Railroad, one Lamline was occupying a quarter section of land in Montana at

the time the R. R. Co. filed its map of definite location, July 6, 1892. His settlement had dated from 1877, and he intended it as his homestead. He died in 1891. A short time prior to his death he sold the improvements he had made on the land to John Trodick, who took possession of the land on the death of Lemline. The land was not surveyed till August 10, 1891, and Trodick made his application for homestead entry January 10, 1896, something more than five years after the survey. The Land Department held

“That since Lemline had no claim of *record* and the *claim of Trodick had its inception subsequent to the definite location of the road, it must be held that the land inured to the grant.*”

The title to land passed by patent to the R. R. Co. who sold it to others. Trodick then brought his action to have the patentee declared a trustee for himself, and his title quieted. The District Court dismissed his bill; an appeal followed to the Circuit Court of Appeals of the 9th Circuit. That court reversed the District Court and the patentee appealed to the Supreme Court of the United States. That court says:

“The lands * * * at the time of definite location of the lines, were occupied by a home-

stead settler * * * Lemline we have seen, was in actual occupancy of the land as a homestead settler when the R. R. Co. definitely located its line. Therefore the lands *did not pass* by the grant of 1864 *but were excepted from its operation* and no right of the R. R. was *attached* to the land when its line was definitely located."

N. P. R. R. vs. Trodick Supra.

Further along the court says:

"It must be taken that by reason of Lemline's actual occupancy as a bona fide homestead settler, at the time of definite location of the R. R. line, these lands were *excepted from the grant* and the R. R. Co. did not acquire and could not acquire any interest in them by reason of *such location*. So that the issuing of a patent to it in 1903 based on *such location* was wholly without authority of law. So far as the R. R. Co. was concerned, the way was open to Trodick who had purchased the improvements from Lemline and was in actual possession of the lands as a residence, to carry out his original purpose to make application to enter them under the homestead laws, and thus acquire a full technical title in himself. He made such an application in 1893, the R. R. Co. not having at that time any claims whatever upon the land, for it acquired nothing as to these lands, by definite location of its line * * * He was entitled under the circumstances, having made his application in proper form, and the R. R. Co. having acquired no interest under the definite location of its line, to wait until the land was surveyed, and in the meantime, to stand upon his occupancy, accompanied as such occupancy was, with a bona fide

intention to acquire title, and to reside upon the lands. His claim on the land could not be postponed or defeated by the fact that the R. R. Co. has assumed, without right, at a prior date, to assert a claim to the lands as having passed by the grant and to have become its property, on the definite location of its line."

N. P. R. R. vs. Trodick, supra.

"The land office incorrectly held that the company was entitled to a patent. That was an error of law which was properly corrected by the reversal in the Circuit Court of Appeals of the decree of the Circuit Court with directions to render a final decree recognizing Trodick's ownership."

Id.

In the Whitney case, a claim for indemnity and lieu selection the facts were that one Turner, on the 8th day of May, 1865, filed a claim of soldier's homestead, but never in fact occupied the land, either by himself or his family. On September 30, 1872, the entry was cancelled. On the 7th day of March, 1867, the R. R. Co. made its selection. On the 7th day of May, 1877, Whitney filed upon the land as homestead entry. The R. R. Co. brought an action to have the patent, which had been given Whitney, declared a trust. The trial court decreed that the entry of Turner was void; that the grant to Whitney was unauthorized and of no effect; and entered a decree

in favor of the R. R. Co. The Supreme Court of Minnesota reversed that decision, and a writ of error was taken to the United States Supreme Court. Turner's entry was made a year and ten months prior to the R. R. selection.

The cancellation of Turner's entry was made approximately five years later, and the Whitney entry was made five years later still. The Supreme Court says:

"The question presented for our consideration is whether, upon the facts admitted, the homestead entry upon the land in controversy excepted it from the operation of the land grant under which plaintiff in error (the railroad company) claims title." After quoting extensively from authorities, it says: "Turner's homestead entry excepted the land from the operation of the R. R. grant, and upon the cancellation of that entry, the tract in question did not inure to the benefit of the company, but reverted to the government and became a part of the public domain, subject to appropriation to the first legal applicant."

Hastings & R. R. Co. vs. Whitney, 10 Sup. Rep. 112.

The Court cites in addition the principle laid by it previously:

"That lands originally public, ceased to be

public after they have been entered at the land office." Citing:

Wilcox B. Jackson, 13 Pet. 498;

Witherspoon P. Duncan, 4 Wall. 210.

An action for damages for breach of warranty of the R. R .Co.'s conveyance, under the grant made to the Union Pacific Ry. Co. identical in meaning with other grants: "Miller made a homestead entry on the land July 25th, 1866, the line of definite location was filed September 21, 1866, two months later." After Miller entered the land, he continued to reside there until the spring of 1870, when he *abandoned* his homestead claim, and *bought the land of the Railroad Company*. He then conveyed his interest to one *Lewis Dunmeyer*; then the Miller homestead entry was cancelled with Dunmeyer's consent, and a third party, *C. B. Dunmeyer*, made a homestead entry which the Land Department held to be valid. The Court says:

"It is argued by the company that although Miller's homestead entry had attached to the land within the meaning of the excepting clause of the grant before the line of definite location was filed by it, yet when Miller abandoned his claim so that it no longer existed, the exception no longer operated, and the land reverted to the company; that the grant, by its inherent force

reasserted itself and extended to, or covered the land as though it had never been within the exception. We are unable to perceive the force of this proposition. * * * No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road and others with grants in similar language, have more than once passed through military reservations for forts and other purposes, which have been given up or abandoned as such reservations, and were of great value. Nor is it understood that in any case where lands had been otherwise disposed of, their reversion to the government brought them within the grant.

“Why should a different construction apply to lands to which a homestead or pre-emption right had attached? Did Congress intend to say that the right of the company also attaches, and whichever proved to be the better, should obtain the land? * * * .

“It is not conceivable that Congress intended to place these parties as contestants for the land with the right in each to require proof from the other to complete performance of its obligations. Least of all, is it to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil whom it had invited to its occupation; this great corporation with an interest to defeat the claims and to come between them and the government as to the performance of their obligations.

“The reasonable purpose of the government undoubtedly is that which is expressed, namely, ‘While we are giving liberally to the R. R. Co. we do not give any lands we have already sold,

or to which according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant. No interest in the R. R. Co attaches to this land or is to be founded on this statute. Such is the clear and necessary meaning of the words, that there is granted every alternate section of odd numbers to which these rights have not attached. It necessarily means that if such rights have attached, they are not granted.' ”

Kans. P. R. R. Co. vs. Dunmeyer, 113 U. S. 620.

FURTHER AS TO O'DONNELL'S RESIDENCE

While appellants assert the proceedings in the Land Department are not available as probative facts in respondent's behalf, they quite liberally use them for their own purpose. We believe them equally available to respondents, and as they are in evidence without objection they carry their own weight—effective on all points to which they apply.

In the contest waged between Thurston and the appellant, for the Thurston settlement, (Rec. 113 to 208) the residence of O'Donnell was established; his right to and qualification for settlement fully determined. The appellant was a party to that proceeding and bound by that decision.

If, however, we are mistaken in that, no one knew better than O'Donnell where he resided, and he explicitly says he was residing on the land on the 9th of May, 1902, when the selection was attempted (R. 159). The cabin was completed and occupied in March, 1901 (R. 140 and in 1903, Id. 141, 150), occupancy continued up to October 22, 1906 (R. 158, 159, 244). That fall Thurston relinquished to Beebe.

If on May 9th, 1902, O'Donnell was residing on the land, intending to acquire it as a homestead, the selection did not and could not attach. The argument that if the land was afterward abandoned or reverted to the United States, by relinquishment, the selection would intervene, flies in the face of the decision in *St. P. M. & M. R. vs. Donohue supra* and *Forseyth vs. Same, supra*.

Both those cases arose from an attempt to enforce the identical lieu selective script as at bar; both where the original settler had sold his improvements to the claimant, and the entry had been declared abandoned by Departmental decision; and in each case the claimant sought to acquire the land under differing entries than contemplated by the original settler.

Appellants say O'Donnell abandoned his entry;

in the next paragraph it is asserted he never relinquished it, and claimants under him could not for that reason prevail. Well, if he had a settlement to abandon, he left what appellant could not take; if he never relinquished, his entry still precludes appellants. The sensible construction is to say that since the settler takes by settlement, he relinquishes by sale or transfer to the next settler; not by actual record in the Land Office. The transfer to Thurston operated exactly as if it had taken place after entry at the Land Office, and a written relinquishment filed; in each instance the "next settler" entered; in one by settlement, in the other by filing; in both the results were the same.

We might rest on this point alone, but appellants seem so sincere in asserting, 1st, that O'Donnell never entered, and 2nd, he never abandoned, that we will notice further: He bought a former claimant, \$100.00 out; he placed improvements \$150.00; he furnished a house for domestic use; and living supplies; toiled to clear land; ate and slept there; declared it his home; warned others of his holdings, and never acted otherwise than as proprietor. If he was doing this as a practical joke, or an enjoyable way of spending his money, he differed materially

from the ordinary young men of his time; so materially indeed that some evidence should be sought showing his intentions were contrary to his conduct. Men usually intend the things they say and do; courts so understand and construe. It will be so in this case. That a sister says she was "too young to understand much about it" (R. 251) and "when my brother had his homestead he made his home practically with us week ends," means little. If made, it is the natural expression of children, whether babes or grownups to call the parental domicile home. Old as we are, we speak of the residence of our parents as home; though maintaining a domicile of our own. Sayings of that kind don't overcome a man's conduct. The same argument applies to the voting suggested—mere guesses—the only positive fact drawn from the witness was, "Father told him not to fight the script; up to that time he claimed it as a homestead." (R. 251.)

There is no other evidence tending to show abandonment, and in as much as he asserted his right until his sale to Thurston, we think residence was fully established, without invoking the adjudication of the Land Department in his favor.

THE EXTENT OF LAND TAKEN

In ordinary parlance "homestead" means the entry of 160 acres of the public lands for the purpose of acquiring title to it. It carries the right to adjoining lands equaling 160 acres. It is significant that selectors, under lieu land claims, always assert the settler must be confined to the single subdivision whereon his improvements are found. The ardor of this argument springs from the fact that the selection usually covers, not alone the land on which the improvements are situated, but all surrounding land from which the settler might take. The same argument was made in the Donohue case *supra* with the decision adverse to the contention. We rest on that case.

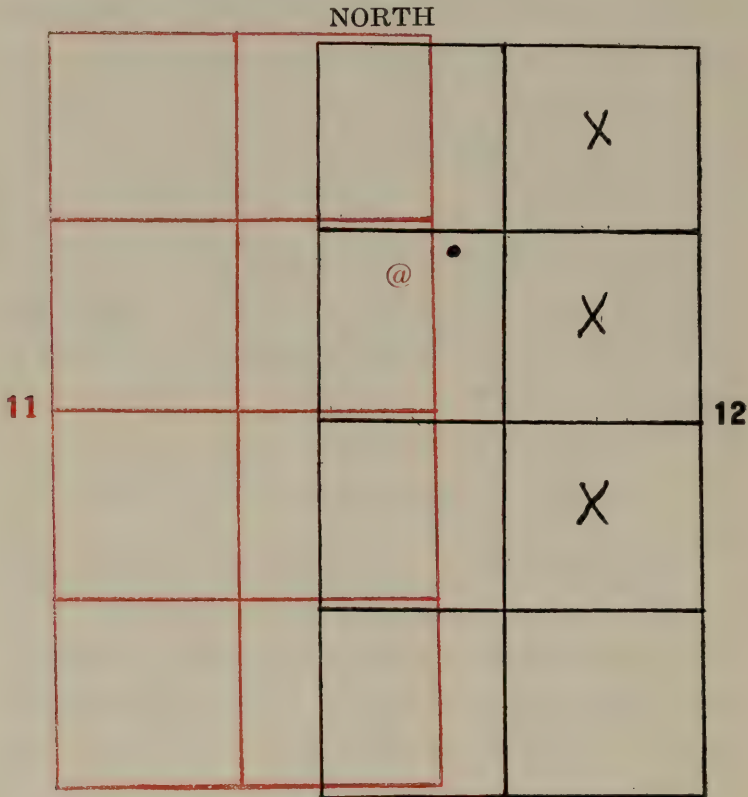
SURVEYS

Two descriptions are shown locating the situs of the land claimed, owing to differing surveys, made at different times. A map or plat is submitted which illustrates the overlap of the second survey, and the location on the ground of the improvements upon which the respondent relies with reference to both surveys. This map shows that whether the description is read from the old survey or the accepted

survey, the improvement which initiated the home-
stead claim is situated within the lines of both; ap-
plicable alike to either for finding the ground en-
tered upon. This map is here shown.

RED— Old Galbraith Survey E $\frac{1}{2}$ 11—

DARK—Official Survey W $\frac{1}{2}$ 12



• Present Home.

@ Old Cabin.

X Thurston's Claim.

11 and 12 Center.

The entry of Cole, succeeded by O'Donnell, was for the $E\frac{1}{2}$ of $E\frac{1}{2}$ of 11, counting by the first survey; it was the $W\frac{1}{2}$ of $W\frac{1}{2}$ of 12, counting by the official survey. The latter survey located the lines of the sectional boundaries 68 rods west of lines in the former survey. If the element of notice is a factor, which it is not, the locator of the script was notified of the entry. The original entry was in accordance with an authorized but rejected survey. When the official subsequent survey came in the land was found to be in section 12. From this conflict, or shifting of the survey, it is argued first, that the Land Department did not decide the respondents' claim on the location of actual settlement, but on the "situs of his homestead"; second there were no improvements on the situs, and no homestead attached. If the first prevails the Department erred in deciding a question of law on undisputed facts; if the second prevails it erred in attributing facts contrary to law.

The evidence is all one way that the land settled upon by the entryman is the land claimed by respondents; its situs has never been disturbed; it lies exactly in the same place, whether discovered by the rejected survey or the accepted survey. Start with either and follow along and you arrive at the same

spot on earth. It was a piece of earth settled upon, resided upon, never moving, that held the settler. He had his situs where he pillowed his head, and if the Land Department shifted from that place it left the facts and fluttered into dreamland. It fell into error in attempting to move the settler's only right to patent.

There has never been a moment when the situs of the homestead was severed from the E $\frac{1}{2}$ of E $\frac{1}{2}$ of 11 by the old ,and W $\frac{1}{2}$ of W $\frac{1}{2}$ of 12 by the new survey.

Further, the life of a settlement depends, as so admirably depicted in appellant's brief, upon residence and improvement on some portion of the land entered; so that all parts unite; and the improvements must be included in the portion taken when patent is asked. This is the holding in *Great Northern Ry. vs. Hower*, 236 U. S. 702. There the settler claimed and improved the land sought; he did not claim, and did not seek a 40-acre subdivision lying between his resident situs and his "homestead situs." The residence situs prevailed. If the law favored the railway in that case, it must favor respondents at bar. We approve it in all its reasoning; it excludes the Thurston claim and upholds respondents.

Those cases cited by appellant showing the allowance of the entry, though the improvements were not on the land, are quite distinct. In each case where the entry was permitted, the line of survey was so close necessarily the mistake was an inadvertance, within the reasonable belief that it was actually on the land sought. In no case has the courts or Department ruled that final proof was acceptable, where the distance between the improvements and the land applied for was as great as in the Thurston claim. Thurston could not have been mistaken; he had sold that claim to Beebe, and knew respondents were occupying it.

It is respectfully urged no objection can prevail for want either of residence on the part of O'Donnell; the location of the homestead situs; the location of the improvements, or the quantity of land to be recovered.

THE RIGHT TO CONVEY

Adverting to the contention that the settler shall lose his rights of entry and settlement, if he sells his holdings, it is not believed appellants are sincere in trying to fit the facts in this record to *Bailey vs.*

Sanders, 228 U. S. 603. It is only by pure imagination such an accusation finds place in this record. It is primer class law that a settler cannot transfer the title to public land, nor convey an interest in the fee as against the United States and its grantees. But, as to all others he is owner, and holds in his own right. He may resist its invasion and trade on its value. If he relinquishes his rights by either method available, his grantor gets no title in the soil, but is not disqualified from succeeding as a settler and will be protected in his effort to do so. If he refuses or fails in that, the entry is open to the next applicant. The right to sell his improvements, and his relinquishment has long been recognized as part of our land system, and upheld in practice.

Catholic Bishops vs. Gibbon, 158 U. S. 155.

St. P. M. & M. R. R. vs. Donahue, *Supra*.

The clear right and active equity of this case are in the respondents; they stand in privity, and assert the rights of the United States to this land. They are bona fide settlers, coming clean handed, asking they be given what they have earned. They are depriving no one of anything not rightfully theirs. They have deceived no one; they have injured no one.

It is respectfully submitted the decision of the lower court is sustained by every test of law and righteousness and should be affirmed.

Respectfully,

S. M. BRUCE,

Solicitor for Respondent.

First National Bank Bldg., Bellingham, Wash.

In the
United States Circuit Court
of Appeals 3
For the Ninth Circuit

No. 3952

GREAT NORTHERN RAILWAY COM-
PANY, a corporation, and BELLING-
HAM BAY IMPROVEMENT COM-
PANY, a corporation, *Appellants,*

VS.

ALBERT R. MCPHEE and FRANCES
MCPHEE, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

APPELLANTS' PETITION
FOR REHEARING

THOMAS BALMER

302 KING STREET PASSENGER STATION, SEATTLE, WASH.

CLINTON W. HOWARD

206 FIRST NATIONAL BANK BLDG., BELLINGHAM, WASH.

SOLICITORS FOR APPELLANTS.

FILED

U. S. DEPARTMENT OF JUSTICE
CLERK

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

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GREAT NORTHERN RAILWAY COM-
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UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION.

**APPELLANTS' PETITION
FOR REHEARING**

Appellants respectfully petition the court to grant a rehearing and reargument of this case, upon the ground that the court has failed in its decision to notice or decide important questions of

law presented by the appellants' original briefs herein, to-wit:

1. That the O'Donnell claim had not attached or been initiated as early as the date of the filing of the selection list;

2. That the land claimed by the appellees is not coincident with the O'Donnell claim to more than forty acres of the land in controversy;

3. That when the selection list was filed in 1902 there was no conflict between the land claimed by O'Donnell in Section 11, and that claimed by the Railway Company in Section 12, and that the successors of O'Donnell could not, when a change was made in the survey, shift their claim upon the Railway Company's land.

This motion is based upon the record of this court in this cause, the brief appended hereto and the certificate of counsel required by Rule 29.

THOMAS BALMER,
Solicitor for Appellant,
Great Northern Railway Company.

CLINTON W. HOWARD,
Solicitor for Appellant,
Bellingham Bay Improvement Com-
pany.

BRIEF

We shall not cavil at the decision rendered on the subjects considered by the court, but since this case is one of which the United States Supreme Court has appellate jurisdiction, we are most earnestly desirous that this court render a complete decision on all the questions presented by the record and raised in the original briefs.

The decision of this court is subject to review by the United States Supreme Court on appeal. The petition for removal was based both upon diverse citizenship of the parties and Federal questions shown by the complaint, and these Federal questions are likewise apparent upon the face of the second amended complaint upon which the case went to trial in the district court (Tr. 1-10). The appellate jurisdiction of the Supreme Court is therefore clear. *Butte & Superior Copper Co. v. Clark-Montana Realty Co.*, 249 U. S. 12, 63 L. Ed. 447; *Weiland v. Pioneer Irrigation Co.*, 66 L. Ed. 639; *Northern Pacific R. Co. v. Soderberg*, 188 U. S. 526, 47 L. Ed. 575. Appellants submit that they should not be placed under the disadvantage of asking the

Supreme Court to review questions which, though squarely presented to this court in the original briefs, have not been noticed in the decision. Those points will be briefly stated.

(1) *The O'Donnell Claim had not Attached or Been Initiated as Early as the Date of the Filing of the Selection List.*

In deciding that the land was reserved from selection by reason of the O'Donnell settlement, the court seems to have done nothing more than examine the decision of the Land Department rejecting the homestead entry of McPhee (Tr. 76-81), and to have ignored the evidence taken at the trial. The court must have overlooked the fact that the McPhee proceedings in the Land Department were entirely ex parte as to the appellants. Of course if the court looks only at those ex parte proceedings the claims of the appellees may be found justified, for it is there stated:

"The affidavit of McPhee alleges that the land applied for by him was in 1901 embraced in the settlement of one Al Small, who sold whatever rights he might have to Dan O'Donnell; that O'Donnell went into actual occupation of the land and was a settler thereon at the time of the filing of the Railway Company's list." (Tr. 77.)

But Al Small's evidence at the trial and that of appellee's other witnesses did not substantiate this affidavit. On the contrary, no one testified that O'Donnell had established a residence or had settled upon the land in May, 1902. In fact, Small testified that in April or May, 1902, the cabin which O'Donnell had bought the preceding fall from a prior settler was roofless and unoccupied (Tr. 238). Small's testimony is brief (Tr. 235-241; 244-246), and is extremely vague as to the time and character of O'Donnell's tenure. It is the only evidence in the record on that subject. It is the only evidence opposing the patent. The law of the case on such a record is clear and logical.

First, the McPhee proceedings in the Land Department were ex parte, and consequently the evidence there tendered by McPhee was not binding in any sense upon the Railway Company. It has already been so held by this court in the opinion filed in this case as respects the controversy between Thurston and McPhee. *Unita Tunnel Co. v. Creed and Cripple Creek Mining & Milling Co.*, 119 Fed. 164; *Creed Mining & Milling Co. v. Unita Tunnel Co.*, 196 U. S. 337, 49 L. Ed. 501. If McPhee was not bound by the Thurston proceedings

in the Land Office because he was not a party to them, then the Railway Company was not bound by the McPhee proceedings there, to which it was never a party.

Second, it was incumbent upon McPhee to prove the allegation that O'Donnell had initiated a claim to this land at the time of the filing of the selection list by clear, unequivocal and convincing proof. *Oregon & California R. Co. v. U. S.*, 190 U. S. 186, 47 L. Ed. 1012; *Maxwell Land Grant* case, 121 U. S. 325, 30 L. Ed. 949; *Colorado Coal, etc., Co. v. United States*, 123 U. S. 307, 31 L. Ed. 182; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 31 L. Ed. 747; *United States v. Des Moines, Nav. etc., Co.*, 142 U. S. 510, 35 L. Ed. 1099; *United States v. Budd*, 144 U. S. 154, 36 L. Ed. 384; *United States v. American Bell Tel. Co.*, 167 U. S. 224, 42 L. Ed. 144; *United States v. Stinson*, 197 U. S. 200, 204, 49 L. Ed. 724. A patent is no longer an instrument of respect and security if subject to be overthrown by such fugitive, self-contradictory and uncertain evidence as that offered by the plaintiff at the trial concerning the O'Donnell claim.

Third, although O'Donnell in October, 1901, purchased the improvements of a prior settler, that

fact did not initiate any settlement right in his own behalf. *Knight v. Haucke*, 2 L. D. 188; *Willis v. Parker*, 8 L. D. 623; *Bunger v. Dawes*, 9 L. D. 329; *Esperance v. Ferry*, 13 L. D. 142; *Stone v. Cowles* (on review), 14 L. D. 90; *Leonard v. Northern Pacific R. R. Co.*, 15 L. D. 69; *Matthews v. Barbarovie*, 18 L. D. 446; *Dobie v. Jameson*, 19 L. D. 91; *Da Cambra v. Rogers' Heirs et al.*, 19 L. D. 237; *Kelso v. Hickman*, 26 L. D. 616; *Medimont Townsite v. Blessing*, 27 L. D. 629.

Fourth, he could establish a settlement right only by taking up a residence on the land, and according to the testimony of his own sister, he never made his home there (Tr. 249-252), while, according to the testimony of Small, the dates of his earliest visits to the land did not occur prior to the filing of the selection list (Tr. 238, 245, 246).

Fifth, unless O'Donnell had settled on the land at the time of the filing of the selection list in May, 1902, the land was not exempt from selection. *St. Paul, M. & M. R. Co. v. Donohue*, 210 U. S. 21, 52 L. Ed. 941; *Great Northern R. Co. v. Hower*, 263 U. S. 702, 59 L. Ed. 798. Unless he was living on the land when the scrip was filed the land was open to selection, for, as said in the opinion already rendered in this case concerning this same settler:

“Residence on one tract will not support a homestead claim to another and distinct tract.”

We are confident that if the court will examine this question in the light of the evidence submitted at the trial and not upon the ex parte statements and affidavits tendered by McPhee to the Land Department, it will conclude that the land was not reserved by reason of any settlement by O'Donnell at or prior to the time of the filing of the selection list.

(2) *The Land Claimed by Appellees is not Coincident with the O'Donnell Claim to more than Forty Acres of the Land in Controversy.*

The trial court found a privity between O'Donnell and McPhee as to only forty acres of the land in controversy, saying in the memorandum opinion of July 19th, 1921:

“The cabin was built by Cole and O'Donnell, occupied by O'Donnell and was upon the southwest quarter of the northwest quarter of Section 12 at the time the scrip was filed; that O'Donnell conveyed his right to his claim, *including the southwest quarter of the northwest quarter* to Thurston, and that Thurston conveyed his right to the *southwest quarter of the northwest quarter* to Beebe is undisputed. The fact that each filed upon their claims in harmony with this division is conclusive,

and Thurston testifies that 'being a quarter of a mile back from there I drops one forty and takes another forty.' *The forty that he dropped was the forty that Beebe obtained, on which was the cabin, and the forty Thurston took was the forty he got from Beebe.*" (Tr. 218-219.)

O'Donnell himself when a witness in the Land Department described his claim as containing only forty acres of the present McPhee claim (Tr. 151). It is true that the forty he mentioned was different from the one found by the District Court to have been dropped by his successor, Thurston, to Beebe; but the discrepancy is readily explainable in view of the uncertainty as to the location of the cabin with reference to the official survey (Tr. 235, 247, 256).

But the point is put beyond doubt by the evidence of Beebe. Beebe's original homestead claim was initiated in August, 1906, while O'Donnell was still holding his claim. Beebe's claim covered the south half of the southwest quarter of Section 1, and the north half of the northwest quarter of Section 12. This included the northwest quarter of the northwest quarter of Section 12, which the court by its decision necessarily finds to have been a part of the O'Donnell claim. *But Beebe did not claim as successor of O'Donnell. He was a contemporary*

of O'Donnell, and their claims were to different land. He did not buy his claim from O'Donnell, but held it as a matter of original entry himself. This was in August, 1906 (Tr. 215), and O'Donnell did not sell out to Thurston until October, 1906 (Tr. 216). Obviously when Thurston purchased the claim of O'Donnell he did not assert any right to any land then held by Beebe, because in November, 1906, he paid Beebe fifty dollars to change his claim to the southwest quarter of the southwest quarter of Section 1, the west half of the northwest quarter and the northwest quarter of the southwest quarter of Section 12—one hundred and sixty acres lying one mile long, north and south. He thus changed his claim from one-half mile square to one mile long, but he continued to include in it the northwest quarter of the northwest quarter of Section 12. He held that forty acres, which never had been O'Donnell's, and he got from Thurston in the deal only one forty acres that had ever been O'Donnell's. That was the forty containing the cabin, which, as the trial court said, Thurston "dropped" to Beebe in the exchange. Only from that time and as to that particular land could Beebe and his successor McPhee trace their title or succession back to O'Donnell.

Beebe was thus in possession of the north forty acres of the present McPhee claim as a part of his own homestead while O'Donnell was still claiming his own homestead. It is inconceivable that the court should now hold that the O'Donnell claim included land of which another homesteader was concededly in possession at and prior to the time O'Donnell disposed of his claim. If the court will examine the trial court's memorandum opinion of July 1st, 1921, and the Land Department's decision therein quoted, in connection with the testimony of Beebe in the trial of this case (Tr. 242-243), it will be convinced that Beebe, the predecessor of McPhee, did not come into possession of any part of the O'Donnell claim until Thurston "dropped" the forty containing the cabin, and that McPhee cannot trace succession from O'Donnell except as to that forty acres. Consequently even on the basis of the decision already rendered, only that particular forty acres was exempt from selection by the Railway Company.

- (3) *When the Survey Shifted the Appellees and Their Predecessors could not Shift their Claim upon Land which had previously been Selected by the Railway Company without Conflict with any Settler.*

The court has failed entirely to notice this point, which is of great importance. The selection list filed May 9th, 1902, selected "that which will be, when surveyed, the west half of the northwest quarter and the northwest quarter of the southwest quarter of Section 12" (Defendants' Exhibit "A"). The Act of August 5th, 1892 (26 Stat. 390), permitted the selection of unsurveyed land, with the requirement that within three months after survey a new selection list be filed describing the tracts according to survey. It is not disputed in the present case that this was done.

When the selection list was filed in 1902 there was concededly no conflict between the O'Donnell claim (admitting that it had been then initiated) and the tract selected by the Railway Company. The O'Donnell claim was located according to what was known as the unofficial Galbraith survey, and to the extent that it covered any land now within the McPhee claim it was in the east string of forties

of Section 11 as then surveyed (Tr. 239). The official survey filed in 1907 moved the east line of Section 11 westward approximately 825 feet, and about two-thirds of the land in controversy thus fell into Section 12 (Tr. 236, 239, 256). About one-third of the land in the east line of forties of Section 11 by the old survey still remains there by the official survey. The remaining two-thirds is now a part of the west line of forties of Section 12, which was selected by the Railway Company.

It seems to be the contention of the appellees, and is apparently the silent holding of the court, that when the survey shifted it was competent for the predecessors of the appellees to shift their claim with it, although they had publicly advertised to the world that their claim was in Section 11. They are now permitted to take an equal quantity of land in Section 12, although in the meantime the land in Section 12 had been selected in good faith and unequivocally claimed by an innocent party. And this is allowed, although the land itself is only partially identical with that formerly claimed.

Appellants claim the same land they have always claimed. Appellees, on the contrary, shifted their

claim in 1907, and then for the first time created a conflict. They shifted not merely to the extent of the change of survey, but some 495 feet beyond it.

We submit that when it was found by McPhee's predecessor that the lines of Section 11, in which their claim lay, had been shifted to the westward by the official survey, their claim should have been required to conform to the survey. If there was no other occupant or claimant of the land newly covered by their description no one would be harmed. If there was an adverse claim, the conflicting rights might have been adjusted to the satisfaction of the parties under the settled practice of the Land Department, or by a court of equity if an agreement were impossible. Authorities to this effect are cited on pages 132 to 135 of the original brief. Since the present case is one in equity, we submit that the court should not sanction a rule so inequitable as to allow the shifting of the claim in the opposite direction of that in which the survey moved, and farther than the survey moved, to the injury of the appellant Railway Company, which had years before recorded its claim in the Land Office, and described the tract claimed once for all time as definitely ly-

ing in Section 12 wherever Section 12 might fall upon the filing of the official survey.



The court must realize the disadvantage at which the appellants will lie in endeavoring to have the Supreme Court of the United States examine these questions when they have not been noticed in the opinion of this court. They were definitely raised in the original briefs, and we submit that we are entitled to the careful judgment of this court upon them. It is therefore respectfully prayed that the court grant a rehearing, or at least supplement its former opinion by including these questions in the decision.

Respectfully submitted,

THOMAS BALMER,
Solicitor for Great Northern Railway
Company.

CLINTON W. HOWARD,
Solicitor for Bellingham Bay Im-
provement Company.

The undersigned, solicitors for the appellants in the above entitled cause, certify that in their judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

THOMAS BALMER,
Solicitor for Great Northern Railway
Company.

CLINTON W. HOWARD,
Solicitor for Bellingham Bay Im-
provement Company.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.
(IN THREE VOLUMES.)

FORBES P. HASKELL, as Receiver of SCANDINAVIAN-AMERICAN
BUILDING COMPANY, a Corporation, et al.,
vs. Appellants,
McCLINTIC-MARSHALL COMPANY, a Corporation, et al., Appellees.
TACOMA MILLWORK SUPPLY COMPANY, a Partnership Consisting of
ANN DAVIS and R. T. DAVIS, Jr., as Executors of the Estate of
R. T. DAVIS, Deceased, R. T. DAVIS, Jr., LLOYD DAVIS, HARRY
L. DAVIS, GEORGE L. DAVIS, MAUDE A. DAVIS, MARIE A.
DAVIS, RUTH G. DAVIS, HATTIE DAVIS TENNANT and ANN
DAVIS,
vs. Appellants,
McCLINTIC-MARSHALL COMPANY, a Corporation, et al., Appellees.
McCLINTIC-MARSHALL COMPANY, a Corporation, and E. E. DAVIS &
COMPANY, a Corporation, and FAR WEST CLAY COMPANY, a
Corporation,
vs. Appellants,
ANN DAVIS and R. T. DAVIS, Jr., as Executors of the Estate of R. T.
DAVIS, Deceased, et al., Appellees.
WASHINGTON BRICK, LIME & SEWER PIPE COMPANY, a Corporation,
vs. Appellant,
McCLINTIC-MARSHALL COMPANY, a Corporation, et al., Appellees,
BEN OLSON COMPANY, a Corporation,
vs. Appellant,
McCLINTIC-MARSHALL COMPANY, a Corporation, et al., Appellees,
J. P. DUKE, as Supervisor of Banks of the State of Washington, and as
Successor in Office of the Defendant CLAUDE P. HAY, as State
Bank Commissioner of the State of Washington, FORBES P. HAS-
KELL, Jr., as Special Deputy Supervisor of Banks of the State of
Washington, and SCANDINAVIAN-AMERICAN BANK OF TACOMA,
a Corporation,
vs. Appellants,
McCLINTIC-MARSHALL COMPANY, a Corporation, et al., Appellees,

VOLUME I.

(Pages 1 to 416, Inclusive.)

Upon Appeals from the United States District Court for the Western
District of Washington, Southern Division.

JAN 30 1923

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.
(IN THREE VOLUMES.)

FORBES P. HASKELL, as Receiver of SCANDINAVIAN-AMERICAN
BUILDING COMPANY, a Corporation, et al.,

Appellants,

vs.
McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees.

TACOMA MILLWORK SUPPLY COMPANY, a Partnership Consisting of
ANN DAVIS and R. T. DAVIS, Jr., as Executors of the Estate of
R. T. DAVIS, Deceased, R. T. DAVIS, Jr., LLOYD DAVIS, HARRY
L. DAVIS, GEORGE L. DAVIS, MAUDE A. DAVIS, MARIE A.
DAVIS, RUTH G. DAVIS, HATTIE DAVIS TENNANT and ANN
DAVIS,

Appellants,

vs.
McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees.

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Appellant,

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Attorneys for John P. Duke, as Supervisor of Banks of the State of Washington, etc., Appellant No. 6. [2]

Bill of Complaint (Original).

To the Honorable E. E. CUSHMAN, Judge of the
District Court of the United States, for the
Western District of Washington:

*Page-number appearing at foot of page of original certified Transcript of Record.

McClintic-Marshall Company, a corporation organized and existing under the laws of the State of Pennsylvania and a citizen of said state, brings this its bill agaist the Scandinavian-American Building Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Scandinavian-American Bank, a corporation organized and existing under and by virtue of the laws of the State of Washigton and a citizen of said state, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant, and Ann Davis, all citizens of the State of Washington, save Hattie Davis Tennant, who is a citizen of the [3] State of California, copartners doing business under the name and style of Tacoma Millwork Supply Company, G. Wallace Simpson, a citizen of the State of Missouri, P. Claude Hay, State Bank Commissioner for the State of Washington, and a citizen of the said State of Washington, and Forbes P. Haskell, Deputy State Bank Commissioner for the State of Washington, and a citizen of the State of Washington, and thereupon your orator complains and says as follows:

I.

Your orator is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and a citizen of said state.

II.

On information and belief the defendant Scan-

dinavian-American Building Company is a corporation organized and existing under the laws of the State of Washington, and a citizen of said state.

III.

On information and belief the defendant Scandinavian-American Bank is a corporation organized and existing under the laws of the state of Washington and a citizen of said state.

IV.

On information and belief the defendants Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, constitute a copartnership, doing business in Tacoma, Washington, under the name and style of Tacoma Millwork Supply Company, and all of said named defendants, with the exception of Hattie Davis Tennant, are citizens of the State of Washington, and the said Hattie Davis Tennant is a citizen of the State of California. [4]

V.

On information and belief the defendant G. Wallace Simpson is a citizen of the State of Missouri.

VI.

The defendant P. Claude Hay is the duly appointed, qualified and acting State Bank Commissioner for the State of Washington, and the defendant Forbes P. Haskell is the duly appointed, qualified and acting Deputy State Bank Commissioner

for the State of Washington, and the said P. Claude Hay and the said Forbes P. Haskell are citizens of the State of Washington.

VII.

Further your orator shows that the matter and said amount in the above-entitled action exceed, exclusive of cost, the sum or value of \$3,000.

VIII.

That at all the times hereinafter and in this bill mentioned the defendant Scandinavian-American Building Company, a corporation, was and now is the owner of lots ten (10), eleven (11) and twelve (12), in block one thousand and three (1003) as the same are shown and designated upon a certain plat entitled "Map of New Tacoma, W. T." which was filed for record in the office of the auditor of Pierce County, Washington Territory, February 3, 1875.

IX.

That heretofore and on or about the 5th day of February, 1920, your orator, McClintic-Marshall Company, entered into a written contract with the defendant, Scandinavian-American Building Company, a copy of which contract is hereto attached marked Exhibit "A," made a part hereof, and prayed to be taken as such.

X.

That thereafter and in accordance with the terms of said contract your orator, between the said 5th day of February, [5] 1920, and October 21, 1920, delivered to the said Scandinavian-American Building Company the structural steel called for in said contract, of the value of \$263,437.54, no part of

which has ever been paid, save and except the sum of \$86,805.17, and there was on the 24th day of December, 1920, and now is due to your orator for material so furnished to the said Scandinavian-American Building Company in accordance with the terms of said contract, the sum of \$176,632.37, with interest at the rate of six per cent per annum on \$45,820.66 from September 20, 1920, on \$95,501 from October 20, 1920, on \$31,842.94 from November 20, 1920, and on \$3,465.76 from December 20, 1920, said contract providing that the said Scandinavian-American Building Company should pay to your orator the sum of "eighty-five per cent of the full value of each shipment on the 20th day of the month following date of such shipment, the remaining fifteen per cent thirty days thereafter," and the dates from which interest is claimed being the 20th day of the month following date of shipment.

XI.

Further your orator shows that all of the material so sold and delivered by it to the Scandinavian-American Building Company was by the said defendant used in the erection of a certain sixteen-story building, situate upon the lands and premises hereinbefore described, said lands and premises being owned by the said Scandinavian-American Building Company as hereinbefore alleged, and all of said lands and premises were necessary for the construction and convenient use of said building.

XII.

Further your orator shows that on, to wit, the

24th day of December, 1920, there being due from said Scandinavian-American Building Company to your orator the sum of \$176,632.37, with interest from the dates and on the amounts hereinbefore specified, [6] and it being without any security for the payment of said money, it duly filed and recorded with the County Auditor for Pierce County, Washington, being the county in which said property is situate, its claim of lien, duly verified by oath, said lien being filed under and by virtue of section 1134, of Remington's Codes and Statutes of the State of Washington, a copy of which said lien is hereto attached marked Exhibit "B," made a part hereof, and prayed to be taken as such. Said lien was recorded by the auditor of Pierce County, Washington, in volume 15 of Liens, at page 613.

XIII.

Further your orator shows that the defendants, Scandinavian-American Bank, a corporation, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant, and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company, G. Wallace Simpson, P. Claude Hay and Forbes P. Haskell as State Bank Commissioner and Deputy State Bank Commissioner respectively, have or claim to have some right, title, lien or interest in and to said premises but whatever the nature of said right, title, interest or claim may be, if any,

the same is junior, subsequent and inferior to the lien of the said complainant.

IX.

Further your orator shows and represents to the Court that it has been compelled to employ attorneys for the purpose of protecting and preserving its interest and enforcing its lien, and that it is entitled under and by virtue of section 1141 of Remington's Codes and Statutes of the State of Washington, to the allowance of a reasonable attorneys fees, which it alleges and avers to be the sum of \$15,000. [7]

In consideration whereof, and forasmuch as your orator is remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this kind are properly cognizable, your orator therefore prays the decree of this Honorable Court:

1. That the defendants and each of them may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were herein expressed, and they thereunto particularly interrogated, but not under oath, answer under oath being hereby expressly waived.

2. That your orator may have a judgment against the defendant Scandinavian-American Building Company for the sum of One Hundred Seventy-six Thousand Six Hundred Thirty-two and 37/100 Dollars (\$176,632.37), with interest at the rate of six per cent per annum on \$45,820.66, from September 20, 1920, on \$95,501, from October 20, 1920, on \$31,842.94 from November 20, 1920, on \$3,465.76 from December 20, 1920, together with the further sum of

\$15,000 as and for attorneys fees for the foreclosure of its said lien, and for all its costs and expenses herein incurred, and to be incurred, and that the same and the whole thereof be adjudged a first and valid lien against the lands and premises hereinbefore described. Further your orator prays that said lands and premises and the building thereon situated be adjudged and decreed to be sold in satisfaction of the amount so found due to your orator according to law and the practice of this court, and that the proceeds of such sale be applied in payment of the costs of these proceedings and sale and reasonable attorneys fees in the sum of \$15,000, and your said orator's claim amounting to the sum of \$176,632.37, besides interest as hereinbefore specified. [8]

Further your orator prays that said defendants and all persons claiming under them or either of them subsequent to the filing and recording of your orator's lien in the office of the auditor of Pierce County, Washington, either as purchasers or encumbrancers, lienors or otherwise, may be barred and foreclosed of all right, claim or equity of redemption in the said premises and every part thereof, and that it may have a judgment and execution against the defendant, Scandinavian-American Building Company, for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of its said judgment. That your orator or any other parties to this suit may become a purchaser at said sale, and that the officer executing

the sale shall execute and deliver the necessary conveyances to the purchaser or purchasers, and that said purchasers or purchaser at said sale may be let into the possession of said premises.

3. That your orator may have such other and further relief in the premises as may be just and equitable, and as your Honor shall deem just.

May it please your Honor to grant to your orator writs of subpoena, to be directed to the said defendants, Scandinavian-American Building Company, a corporation, Scandinavian-American Bank, a corporation, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant, and Ann Davis, copartners doing business under the firm name and style of Tacoma Millwork Supply Company, G. Wallace Simpson, P. Claude Hay, as State Bank Commissioner, for the State of Washington, and [9] Forbes P. Haskell as Deputy State Bank Commissioner for the State of Washington, therein and thereby commanding them and each of them at a certain time and under a certain penalty therein to be named to be and appear before your Honor in this Honorable Court, then and there severally to answer all and singular the matter aforesaid, but not under oath, answer under oath being hereby expressly waived, and to stand to and abide and per-

form such other and further orders or decrees as to your Honor shall seem meet.

McCLINTIC-MARSHALL COMPANY, a
Corporation.

By ELMER M. HAYDEN,
MAURICE A. LANGHORNE,
F. D. METZGER,
Attorney for Complainant. [10]

Exhibit "A."

This AGREEMENT, made this 5th day of February, 1920, by and between McClintic-Marshall Company of Pittsburgh, Pennsylvania Corporation, hereinafter termed the CONTRACTOR, and Scandinavian-American Building Co., Tacoma, Washington, hereinafter termed the PURCHASER,

WITNESSETH, That in consideration of the mutual promises hereinafter stated, the parties hereto mutually agree as follows:

ARTICLE I. The Contractor agrees to furnish and deliver, f. o. b. cars, their works present rate of freight allowed to Tacoma, Washington, exclusive of spotting, switching or other delivery charges, the structural steelwork for the Scandinavian-American Bank Building located at Pacific Ave. and Eleventh Street, Tacoma, Washington, in accordance with the plans Job No. 148 Sheets 1 to 4 inclusive and 8 to 10 and specifications covering Steel and Iron Work as prepared by Frederick Webber, Architect and Engineer, 403 Morris Bldg., Phila., Pa.

Quality of material and workmanship and details of construction not specifically provided for are to be in accordance with the Standard Specifications of the Contractor for work of this Character.

ARTICLE II. The contractor agrees to begin shipment of the material within 60 days and to make complete shipment of the material *with* 120 days after the date of this Agreement, provided all the required data are furnished by the Purchaser to the Contractor within 5 days after the date of this Agreement, and provided further, that the Contractor is not obstructed or delayed by any act, neglect or default of the Purchaser or their employees or agents or by the Rolling Mills, Transportation, Strikes, Fire, Storms, Floods or other causes beyond the reasonable control of the Contractor. [11]

The Purchaser agrees to accept delivery of material when forwarded from Contractor's works or upon transfer of title to pay for said material as though it had been delivered under the terms of the contract and to reimburse the Contractor for any expense it may incur in storing, caring for and rehandling the same.

ARTICLE III. The Purchaser agrees to furnish the Contractor with complete and final data for the work within five (5) days after the date of the Agreement.

ARTICLE IV. Upon written request, the Contractor shall provide, at such times and places as will least interfere with its operations, facilities for the inspection of the work by the Purchaser,

but the Contractor assumes no liability for injuries sustained by the Inspector, except injuries due to the gross negligence or willful default of the Contractor. Any material condemned by the Inspector which is not in accordance with the plans and specifications and is, on this account, unsuitable for the purpose intended, will be replaced by other and suitable material. Any rejection of plain material by the Inspector must be made before shipment from the Rolling Mill and any rejection of finished material on account of workmanship must be made before shipment from the Contractor's works.

ARTICLE V. In consideration of the faithful execution of the work above specified to be performed by the Contractor, the Purchaser hereby promises and agrees to pay to the Contractor the sum of five nine-tenths cents (5.9¢) per pound f. o. b. their works present rate of freight allowed to Tacoma, Washington, exclusive of spotting, switching or other delivery charges. If freight rates or taxes are increased before shipment is made the Purchaser is to reimburse the Contractor for such extra freight and tax paid. In funds current at par in Pittsburgh, or New York City as follows: 85% of the full value of each shipment on the 20th day of the month following date of such shipment, remaining 15% thirty days thereafter. [12]

ARTICLE VI. Failure by the Purchaser to make payments at the times stated in this Agreement shall give the Contractor the right to suspend work until payment is made, or, at his option, after

thirty (30) days notice in writing, should the Purchaser continue in default, to terminate this contract and recover the price of all work done and material provided and all damages sustained; and such failure to make payments at the time stated shall be a bar to any claim by the Purchaser against the Contractor for delay in completion of the work.

ARTICLE VII. No alteration shall be made in the work except upon written order of the Purchaser or his authorized representative, and the amount to be paid by the Purchaser or allowed by the contractor on account of such alterations is to be agreed upon within ten days from date of same. Unless otherwise agreed upon, additional work will be charged by the Contractor at exact cost to the Contractor plus Fifteen (15%) per cent, for profit.

ARTICLE VIII. Should the Contractor at any time refuse or neglect to carry on the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the Purchaser, if not in default, shall be at liberty, after ten days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract.

ARTICLE IX. If at any time there shall be found established evidence of any lien or claim for which the Purchaser might be held liable arising out of any work or materials furnished by the Contractor, the Purchaser, upon presenting such evidence to the Contractor, may retain out of any

payment due or to become due an amount sufficient to indemnify them against such lien or claim, until it has been settled or discharged or until the Contractor furnishes to the Purchaser an indemnity bond, equal in amount to said lien or claim.
[13]

ARTICLE X. It is also further agreed between the parties hereto that any dispute whatsoever growing out of this Agreement shall be referred to three Arbitrators, one to be appointed by each of the parties to this Agreement and the third by the two thus chose. Each Arbitrator shall be qualified by experience in Engineering and Contracting to perform the duties assigned to him. The decision of any two of these shall be final and binding, and each of the parties to this agreement shall pay one-half the expense of such reference.

IN WITNESS WHEREOF the Parties hereto have executed the Agreement at Pittsburgh, Pa., the day and year first above written. Executed in duplicate.

SCANDINAVIAN-AMERICAN BLDG. CO.

By CHARLES DRURY, Prest.

J. V. SHELDON, Secy.

McCLINTIC-MARSHALL COMPANY.

C. D. MARSHALL,

President.

Witness:

G. L. TAYLOR.

Filed in the United States District Court, Western District of Washington, Southern Division.

Jan. 18, 1921, 3:00 P. M. F. M. Harshberger,
Clerk. By Ed M. Lakin, Deputy. [14]

Exhibit "B."

"McCLINTIC-MARSHALL COMPANY, a Cor-
poration,

Claimant,

vs.

SCANDINAVIAN-AMERICAN BUILDING
COMPANY, a Corporation.

NOTICE OF CLAIM OF LIEN.

Notice is hereby given that on the 22d day of May, 1920, McClintic-Marshall Company, a corporation duly organized and existing under and by virtue of the laws of the state of Pennsylvania, having its principal office in the city of Pittsburgh, in said state, at the request and instance of the Scandinavian-American Building Company, a corporation duly organized and existing under and by virtue of the laws of the State of Washington with its principal place of business at Tacoma, commenced to furnish material to the said Scandinavian-American Building Company to be used upon and in the construction of a certain building situate on and covering the whole of lots ten (10), eleven (11) and twelve (12) block 1003 as the same are shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," which property the owner or reputed owner is Scandinavian-American Building Company, the furnishing of which material ceased on October 21st, 1920.

That said material so furnished by claimant to the Scandinavian-American Building Company, a corporation, was of the value of \$263,437.54, upon which amount said Scandinavian-American Building Company, a corporation, is entitled to a credit of \$86,805.17, and there is now due and owing claimant the sum of \$176,632.37, besides interest at the rate of 6% per annum on \$45,820.66 from September 20th, 1920, interest at the [15] rate of 6% per annum on \$95,501.00 from October 20th, 1920, interest at the rate of 6% per annum on \$31,842.94 from November 20, 1920, and interest at the rate of 6% per annum on \$3,465.76 from December 20th, 1920.

And the undersigned claims a lien upon the property herein described for said sum of \$176,-632.37, together with interest at the rate of 6% per annum on the amounts herein specified.

McCLINTIC-MARSHALL COMPANY a
Corporation,

Claimant.

By HAYDEN, LANGHORNE & METZ-
GER,

Its Attorneys.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 18, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [16]

Motion to Dismiss Bill of Complaint.

Come now the Scandinavian-American Building Company, a corporation, Scandinavian-American Bank, a corporation, Claude P. Hay, as State Bank Commissioner for the State of Washington, and Forbes P. Haskell, as Deputy State Bank Commissioner of the State of Washington, defendants above named, and each and every one of them severally moves that the bill of complaint in the above-entitled suit and the whole thereof be dismissed, because the facts therein stated are not sufficient to constitute a valid cause of action in equity against the defendants, either severally or jointly with the other defendants in the following respects and each of them. [17]

I.

It appears from the bill of complaint that this court has no jurisdiction to hear and determine this suit.

II.

The bill of complaint does not state facts sufficient to constitute a valid cause of action against these defendants, or either of them, either severally or jointly with the other defendants.

III.

There is a nonjoinder of necessary parties plaintiff, in that all of the persons interested in the subject matter of the controversy and who may be interested with the complainant herein, are not joined as plaintiffs in the action.

IV.

There is a nonjoinder of necessary parties in that all of the persons adversely interested to the complainant are not made defendants, in that there are a great many lien claimants who have valid and existing claims against the defendant, Scandinavian-American Building Company, who have an interest in the said suit adversely to the complainant herein.

V.

The bill of complaint shows that the lien claimed by the complainant herein is claimed to exist under and by virtue of Section 1134 of Remington's Codes and Statutes of the State of Washington, and these defendants say that under and by virtue of said Codes and Statutes of said State, there can be maintained but one cause of action for the foreclosure of any lien or liens upon the building in [18] controversy in this suit. That there are many lien claimants whose claims against the defendant Scandinavian-American Building Company, are less than the sum of \$3,000.00 and that by reason thereof this court has no jurisdiction to determine the matter in controversy.

VI.

The bill of complaint shows that the claim of the complainant is based upon a certain contract between said complainant and the defendant Scandinavian-American Building Company, a copy of which contract is attached to said complaint, marked Exhibit "A," and made a part thereof, and that by the terms of said contract it was expressly provided as follows:

“It is also further agreed between the parties hereto that any dispute whatsoever growing out of this Agreement shall be referred to three Arbitrators, one to be appointed by each of the parties to this agreement, and the third by the two thus chosen. Each arbitrator shall be qualified by experience in Engineering and Contracting to perform the duties assigned to him. The decision of any two of these shall be final and binding, and each of the parties to this agreement shall pay one-half of the expense of such reference.”

A meritorious dispute growing out of said contract arose between the complainant and the defendant, Scandinavian-American Building Company, and that said defendant, Scandinavian-American Building Company demanded an arbitration of the matters in dispute, and that the complainant failed and refused to arbitrate the said matters in dispute, and that by reason of said failure the said complainant [19] is without authority in law or equity to maintain and is estopped from maintaining this suit.

GUY E. KELLY,
THOS. MacMAHON,
F. D. OAKLEY,

Solicitors for the Above-named Defendants, Scandinavian-American Building Company, Scandinavian-American Bank, Claude P. Hay, Bank Commissioner, and Forbes P. Haskell, Deputy Bank Commissioner.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 7, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [20]

Order Denying Motion to Dismiss Bill of Complaint.

Came on this cause to be heard on the 14th day of February, 1921, upon the motion of the defendants Scandinavian-American Building Company, a corporation, and Scandinavian-American Bank, a corporation, P. Claude Hay, as State Bank Commissioner for the State of Washington, and Forbes P. Haskell, as Deputy State Bank Commissioner for the State of Washington, to dismiss the bill of complaint upon the grounds set forth and recited in their motion heretofore filed, Frank D. Oakley, Esquire, appearing on behalf of said named defendants, and Maurice A. Langhorne of Hayden, Langhorne & Metzger, appearing in behalf of the complainant, and in opposition thereto.

After argument of counsel, the Court being fully advised in the premises, IT IS NOW ORDERED, ADJUDGED AND DECREED, AND THIS DOES ORDER, ADJUDGE AND DECREE that said motion to dismiss so filed on behalf of said defendants, be and the same is hereby denied and overruled.

To the ruling of the Court in denying the motion to dismiss Frank D. Oakley, Esq., of counsel for the defendants, duly excepted, and his exception is hereby allowed.

Done in open court this 17th day of February, 1921.

EDWARD E. CUSHMAN,
District Judge. [21]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 17, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [22]

Order Permitting Plaintiff to File Amended Complaint.

Upon stipulation of counsel for the complainant and of counsel for all the defendants who have appeared herein—

IT IS ORDERED that complainant have leave to file and serve an amended bill of complaint herein, joining as parties thereto all persons, firms and corporations who have filed or claim liens against the property described in the complaint since the filing of the original bill of complaint herein.

Done in open court this 22 day of April, 1921.

EDWARD E. CUSHMAN,
District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Apr. 22, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [23]

Amended and Supplemental Bill of Complaint. [24

To the Honorable EDWARD E. CUSHMAN,
Judge of the District Court of the United
States, for the Western District of Washington,
Southern Division:

McClintic-Marshall Company, a corporation, organized and existing under the laws of the State of Pennsylvania, and a citizen of said state, by leave of court first had and obtained, brings this, its amended and supplemental bill of complaint against the Scandinavian-American Building Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and a citizen of said state, Scandinavian-American Bank, a corporation, organized and existing under and by virtue of the laws of the State of Washington, and a citizen of said state, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant, and Ann Davis, all citizens of the State of Washington, save Hattie Davis Tennant who is a citizen of the State of California, copartners doing business under the name and style of Tacoma Millwork Supply Company, G. Wallace Simpson, a citizen of the State of Missouri, P. Claude Hay, State Bank Commissioner for the State of Washington and a citizen of said State of Washington, and Forbes P. Haskell, Deputy State Bank Commissioner for the

State of Washington and a citizen of the State of Washington, Savage-Scofield Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Puget Sound Iron & Steel Works, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, E. E. Davis & Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, St. Paul & Tacoma Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Far West Clay Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Henry Mohr Hardware Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Hune & Mottet, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Edward Miller Cornice & Roofing Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Washington Brick Lime & Sewer Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Otis Elevator Company, a corporation organized and existing under and by virtue of the laws of the

State of New Jersey and a citizen of said state, and duly admitted to do business in the State of Washington by virtue of having complied with the laws of said State of Washington relative to foreign corporations, United States Machine & Engineering Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Colby Star Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Tacoma Shipbuilding Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Crane Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois and a citizen of that state, but admitted to do business in the State of Washington by virtue of having complied with the laws of said State of Washington, relative to foreign corporations, Ben Olson Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and a citizen of said state, H. C. Greene doing business as H. C. Greene Iron Works, citizen of the State of Washington, Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company, both citizens of the State of Washington, S. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency, both citizens of the State of Washington, J. D. Mullins doing business as J. D.

Mullins Bros., a citizen of the State of Washington, S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company, both citizens of the State of Washington, Morris Kleiner doing business as Liberty Lumber & Fuel Company, a citizen of the State of Washington, J. A. Soderberg doing business as West Coast Monumental Company, a citizen of the State of Washington, Theodore Hedlund doing business as Atlas Paint Company, a citizen of the State of Washington, F. W. Madsen, Gustaf Jonasson, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcelino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short; Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey, and W. E. Morris, all of whom are citizens and residents of the State of Washington, and thereupon your orator complains and says, as follows, to wit: [25]

I.

Your orator is a corporation duly organized and

existing under and by virtue of the laws of the State of Pennsylvania and a citizen of said state.

II.

On information and belief the defendant Scandinavian-American Building Company is a corporation organized and existing under the laws of the State of Washington, and a citizen of said state, and a resident of the southern division of the Western District of Washington.

III.

On information and belief the defendant Scandinavian-American Bank is a corporation organized and existing under the laws of the State of Washington, and a citizen of said state, and a resident of the southern division of the western district of the State of Washington.

IV.

On information and belief the defendants Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, constitute a copartnership, doing business in Tacoma, Washington, under the name and style of Tacoma Millwork Supply Company, and all of said named defendants with the exception of Hattie Davis Tennant, are citizens of the State of Washington, and the said Hattie Davis Tennant is a citizen of the State of California.

V.

On information and belief the defendant G. Wal-

lace Simpson is a citizen of the State of Missouri.

VI.

The defendant P. Claude Hay is the duly appointed, qualified and acting State Bank Commissioner for the State of Washington, and the defendant Forbes P. Haskell is the duly appointed, qualified and acting Deputy State Bank Commissioner for the State of Washington, and the said P. Claude Hay and the said Forbes P. Haskell are citizens of the State of Washington.

VII.

On information and belief the defendants Savage-Scofield Company, Puget Sound Iron & Steel Works, E. E. Davis & Company, St. Paul and Tacoma Lumber Company, Far West Clay Company, Henry Mohr Hardware Company, Inc., Hunt & Mottet, Edward Miller Cornice & Roofing Company, Washington Brick Lime & Sewer Company, United States Machine & Engineering Company, Colby Star Manufacturing Company, Tacoma Shipbuilding Company, and Ben Olson Company, are all corporations organized and existing under the laws of the State of Washington and citizens of said state.

VIII.

On information and belief the defendant Otis Elevator Company is a corporation, duly organized and existing under and by virtue of the laws of the State of New Jersey and a citizen of the state, but has been admitted to do business in the State of Washington by virtue of having complied with

the laws of the State of Washington relative to foreign corporations.

IX.

On information and belief the defendant Crane Company is a corporation, duly organized and existing under and by virtue of the laws of the State of Illinois and a citizen of said state, but has been admitted to do business in the State of Washington by virtue of having complied with the laws of said State of Washington relative to foreign corporations.

X.

On information and belief the defendant H. C. Greene, doing business as H. C. Greene Iron Works, the defendant J. D. Mullins, doing business as J. D. Mullins Bros., S. D. Matthews and Frank L. Johns, a copartnership doing business under the name of City Lumber Agency, Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company, Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal, S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company, Morris Kleiner doing business as Liberty Lumber & Fuel Company, J. A. Soderberger doing business as West Coast Monumental Company, Theodore Hedlund doing business as the Atlas Paint Company, are all Citizens of the State of Washington and residents of the southern division of the western district of Washington. [26]

XI.

On information and belief the defendants F. W. Madsen, Gustaf Jonasson, N. A. Hanson, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergren, F. H. Godfrey and W. E. Morris are each and every one of them citizens of the State of Washington and residents of the southern division of the western district of Washington.

XII.

Further your orator shows that the matter and amount in the above-entitled action exceed, exclusive of cost, the sum or value of \$3,000.

XIII.

That at all the times hereinafter and in this bill mentioned the defendant Scandinavian-American Building Company, a corporation, was and now is the owner of lots ten (10), eleven (11) and twelve (12), in block one thousand and three (1003), as the same are shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," which

was filed for record in the office of the auditor of Pierce County, Washington Territory, February 3, 1875.

XIV.

That heretofore and on or about the 5th day of February, 1920, your orator, McClintic-Marshall Company, entered into a written contract with the defendant Scandinavian-American Building Company, a copy of which contract is hereto attached marked Exhibit "A," made a part hereof, and prayed to be taken as such.

XV.

That after and in accordance with the terms of said contract your orator between the said 5th day of February, 1920, and October 21, 1920, delivered to the said Scandinavian-American Building Company the structural steel called for in said contract, of the value of \$263,437.54, no part of which has ever been paid save and except the sum of \$86,805.17, and there was on the 24th day of December, 1920, and now is due to your orator for material so furnished to the said Scandinavian-American Building Company in accordance with the terms of said contract, the sum of \$176,632.37, with interest at the rate of six per cent per annum on \$45,820.66 from September 20, 1920, on \$95,501.00 from October 20, 1920, on \$31,842.94 from November 20, 1920, and on \$3,465.76 from December 20, 1920, said contract providing that the said Scandinavian-American Building Company should pay to your orator the sum of "eighty five per cent of the full value of each shipment on the 20th day of the

month following date of such shipment, the remaining fifteen per cent thirty days thereafter," and the dates from which interest is claimed being the 20th day of the month following date of shipment.

XVI.

Further your orator shows that all of the material so sold and delivered by it to the Scandinavian-American Building Company was by the said defendant used in the erection of a certain sixteen story-building, situate upon the lands and premises hereinbefore described, said lands and premises being owned by the said Scandinavian-American Building Company as hereinbefore alleged, and all of said lands and premises were necessary for the construction and convenient use of said building.

XVII.

Further your orator shows that on, to wit, the 24th day of December, 1920, there being due from said Scandinavian-American Building Company to your orator the sum of \$176,632.37 with interest from the dates and on the amounts hereinbefore specified, and it being without any security for the payment of said money, it duly filed and recorded with the County Auditor for Pierce County, Washington, being the county in which said property is situate, its claim of lien, duly verified by oath, said lien being filed under and by virtue of section 1134 of Remington's Codes and Statutes of the State of Washington, a copy of which said lien is hereto attached marked Exhibit "B," made a part hereof, and prayed to be taken as such. Said lien

was recorded by the auditor of Pierce County, Washington, in volume 15 of liens at page 613.

XVIII.

Further your orator shows that the defendants Scandinavian-American Bank, a corporation, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. [27] T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company, G. Wallace Simpson, P. Claude Hay and Forbes P. Haskell as State Bank Commissioner and Deputy State Bank Commissioner, respectively, and Savage-Scotfield Company, a corporation, Puget Sound Iron & Steel Works, a corporation, E. E. Davis & Company, a corporation, St. Paul & Tacoma Lumber Company, a corporation, Far West Clay Company, a corporation, Henry Mohr Hardware Company, Inc., a corporation, Hunt & Mottet, a corporation, Edward Miller Cornice & Roofing Company, a corporation, Washington Brick Lime & Sewer Company, a corporation, Otis Elevator Company, a corporation, United States Machine & Engineering Company, a corporation, Colby Star Manufacturing Company, a corporation, Tacoma Shipbuilding Company, a corporation, Crane Company, a corporation, and Ben Olson Company, a corporation, H. C. Greene doing business as H. C. Greene Iron Works, Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and

style of Ajax Electric Company, S. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency, J. D. Mullins doing business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company, Morris Kleiner doing business as Liberty Lumber & Fuel Company, J. A. Soderberg doing business as West Coast Monumental Company, Theodore Hedlund doing business as Atlas Paint Company, F. W. Madsen, Gustaf Jonasson, N. A. Hansen, A. J. VanBuskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Titkalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey and W. E. Morris; Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal, respectively, have or claim to have some right, title, lien or interest in and to said premises, but whatever the nature of said right, title, interest or claim may be, if any, the same

is junior, subsequent and inferior to the lien of the said complainant.

XIX.

Further your orator shows and represents to the court that it has been compelled to employ attorneys for the purpose of protecting and preserving its interest and *and* enforcing its lien, and that it is entitled under and by virtue of section 1134 of Remington's Codes and Statutes of the State of Washington, to the allowance of a reasonable attorney's fee, which it alleges and avers to be the sum of \$15,000.

XX.

That your complainant is not now prosecuting nor has it ever prosecuted any action at law or any proceeding whatsoever, either at law or in equity, for the recovery of the debt so due to it from the said defendant, Scandinavian-American Building Company.

In consideration whereof, and forasmuch as your orator is remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this kind are properly cognizable, your orator therefore prays the decree of this honorable court.

1. That the defendants and each of them may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were herein expressed, and they thereunto particularly interrogated, but not under oath, answer under oath being hereby expressly waived.

2. That your orator may have a judgment against the defendant Scandinavian-American Building Company for the sum of One Hundred Seventy-six Thousand Six Hundred Thirty-two and 37/100 Dollars (\$176,632.37) with interest at the rate of six per cent per annum on \$45,820.66, from September 20, 1920, on \$95,501 from October 20, 1920, on \$31,842.94 from November 20, 1920, on \$3,465.76 from December 20, 1920, together with the further sum of \$15,000 as and for attorneys fees for the foreclosure of its said lien, and for all its costs and expenses herein incurred, and to be incurred, and that the same and the whole thereof be adjudged a first and valid lien against the lands and premises hereinbefore described. Further your orator prays that said lands and premises and the building thereon [28] situated be adjudged and decreed to be sold in satisfaction of the amount so found due to your orator according to law and the practice of this court, and that the proceeds of such sale be applied in payment of the costs of these proceedings and sale and reasonable attorneys fees in the sum of \$15,000.00, and your said orator's claim amounting to the sum of \$176,632.37, besides interest as hereinbefore specified.

Further your orator prays that said defendants and all persons claiming under them or either of them subsequent to the filing and recording of your orator's lien in the office of the auditor of Pierce County, Washington, either as purchasers or encumbrancers, lienors, or otherwise, may be barred and foreclosed of all right, claim or equity of re-

demption in the said premises and every part thereof, and that it may have a judgment and execution against the defendant, Scandinavian-American Building Company, for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of its said judgment. That your orator or any other parties to this suit may become a purchaser at said sale, and that the officer executing the sale shall execute and deliver the necessary conveyances to the purchaser or purchasers, and that said purchaser or purchasers at said sale may be let into the possession of said premises.

3. That your orator may have such other and further relief in the premises as may be just and equitable, and as your Honor shall deem just.

May it please your Honor to grant to your orator writs of subpoena, to be directed to the said defendants, Scandinavian-American Building Company, a corporation, Scandinavian-American Bank, a corporation, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant, and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company, G. Wallace Simpson, P. Claude Hay as State Bank Commissioner for the State of Washington, and Forbes P. Haskell as Deputy State Bank Commissioner for the State of Washington, Savage-Scotfield Company, a corporation, Puget Sound Iron & Steel

Works, a corporation, E. E. Davis & Company, a corporation, St. Paul & Tacoma Lumber Company, a corporation, Far West Clay Company, a corporation, Henry Mohr Hardware Company, Inc., a corporation, Hunt & Mottet, a corporation, Edward Miller Cornice & Roofing Company, a corporation, Washington Brick Lime & Sewer Company, a corporation, Otis Elevator Company, a corporation, United States Machine & Engineering Company, a corporation, Colby Star Manufacturing Company, a corporation, Tacoma Shipbuilding Company, a corporation, Crane Company, a corporation, and Ben Olson Company, a corporation, H. C. Greene, doing business as H. C. Greene Iron Works, Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company, S. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency, J. D. Mullins doing business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company, Morris Kliener, doing business as Liberty Lumber & Fuel Company, J. A. Soderberg, doing business as West Coast Monumental Company, Theodore Hedlund doing business as Atlas Paint Company, F. W. Madsen, Gustaf Jonasson, N. A. Hansen, A. J. VanBuskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave

Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short; and Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey and W. E. Morris, therein and thereby commanding them and each of them at a certain time and under a certain penalty therein to be named to be and appear before your Honor in this honorable court, then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to stand to and abide and perform such other and further orders or decrees as to your Honor shall seem meet.

McCLINTIC-MARSHALL COMPANY,

a Corporation,

MAURICE A. LANGHORNE,

By ELMER M. HAYDEN,

F. D. METZGER,

Attorneys for Complainant. [29]

United States of America,
Western District of Washington,
Southern Division,—ss.

Maurice A. Langhorne, being duly sworn, deposes and says: That he is one of the attorneys for the above-named complainant; that he has read the foregoing Bill of Complaint, knows the contents

thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes the same to be true.

That he makes this verification for the reason that the complainant is a nonresident of the State of Washington and has no officer or agent within this district or within the State of Washington present to verify said Bill.

MAURICE A. LANGHORNE.

Subscribed and sworn to before me this 21st day of April, 1921.

F. D. METZGER,

Notary Public in and for the State of Washington,
Residing at Tacoma.

Exhibit "A."

"THIS AGREEMENT, made this 5th day of February, 1920, by and between McCLINTIC-MARSHALL COMPANY of Pittsburg, a Pennsylvania corporation, hereinafter termed the CONTRACTOR, and SCANDINAVIAN-AMERICAN BUILDING CO., Taroma, Washington, hereinafter termed the PURCHASER.

WITNESSETH, That in consideration of the mutual promises hereinafter stated, the parties hereto mutually agree as follows:

ARTICLE I. The Contractor agrees to furnish and deliver F. O. B. cars, their works present rate of freight allowed to Tacoma, Washington, exclusive of spotting, switching or other delivery charges, the structural steelwork, for the Scandinavian-

American Bank Building, located at Pacific Ave. and Eleventh Street, Tacoma, Washington, in accordance with plans, Job No. 148 Sheets 1 to 4 inclusive and 8 to 10 and specifications covering Steel and Iron Work as prepared by Frederick Webber, Architect and Engineer, 403 Morris Bldg., Phila., Pa.

Quality of material and workmanship and details of construction not specifically provided for are to be in accordance with the Standard Specifications of the Contractor for work of this character.

ARTICLE II. The Contractor agrees to begin shipment of the material within 60 days and to make complete shipment of the material within 120 days after the date of this Agreement, provided all the required data are furnished by the Purchaser to the Contractor within five (5) days after the date of this Agreement, and provided further, that the Contractor is not obstructed or delayed by any act, neglect or default of the Purchaser or their employees or agents, or by the Rolling Mills, Transportation, Strikes, Fire, Storms, Floods or other causes beyond the reasonable control of the Contractor.

The Purchaser agrees to accept delivery of material when forwarded from Contractor's works, or, upon transfer of title, to pay for said material as though it had been delivered under the terms of the contract and to reimburse the Contractor for any expense it may incur in storing, caring for and re-handling the same.

ARTICLE III. The Purchaser agrees to furnish the Contractor with complete and final data for this work five (5) days after the date of this Agreement. [30]

ARTICLE IV. Upon written consent, the Contractor shall provide, at such time and places as will least interfere with its operations, facilities for the inspection of the work by the Purchaser, but the Contractor assumes no liability for injuries sustained by the Inspector, except injuries due to the gross negligence or willful default of the Contractor. Any material condemned by the Inspector which is not in accordance with the plans and specifications and is, on this account, unsuitable for the purpose intended, will be replaced by other and suitable material. Any rejection of plain material by the Inspector must be made before shipment from the Rolling Mill and any rejection of finished material on account of workmanship must be made before shipment from the Contractor's works.

ARTICLE V. In consideration of the faithful execution of the work above specified to be performed by the Contractor, the Purchaser hereby promises and agrees to pay to the Contractor the sum of five and nine-tenths (5.9c) per pound f. o. b., their works present rate of freight allowed to Tacoma, Washington, exclusive of spotting, switching or other delivery charges. If freight rates or taxes are increased before shipment is made, the Purchaser is to reimburse the Contractor for such extra freight and tax paid, in funds current at part in Pittsburgh, or New York City as follows: 85% of the full value of each shipment on the 20th day of

the month following date of such shipment, remaining 15% thirty days thereafter.

ARTICLE VI. Failure by the Purchaser to make payments at the times stated in this Agreement shall give the Contractor the right to suspend work until payment is made, or, at his option, after thirty (30) days' notice in writing, should the Purchaser continue in default, to terminate this contract and recover the price of all work done and materials provided and all damages sustained; and such failure to make payments at the times stated shall be a bar to any claim by the Purchaser against the Contractor for delay in completion of the work.

ARTICLE VII. No alteration shall be made in the work except upon written order of the Purchaser or his authorized representative, and the amount to be paid by the Purchaser or allowed by the Contractor on account of such alterations is to be agreed upon within ten days from date of same. Unless otherwise agreed upon, additional work will be charged by the Contractor at exact cost to the Contractor plus Fifteen (15%) per cent. for profit.

ARTICLE VIII. Should the Contractor at any time refuse or neglect to carry on the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the Purchaser, if not in default, shall be at liberty, after ten days' written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract.

ARTICLE IX. If at any time there shall be

found established evidence of any lien or claim for which the Purchaser might be held liable arising out of any work or materials furnished by the Contractor, the Purchaser, upon presenting such evidence to the Contractor, may retain out of any payment due or to become due an amount sufficient to indemnify them against such lien or claim, until it has been settled or discharged or until the Contractor furnishes to the Purchaser an indemnity bond, equal in amount to said lien or claim.

ARTICLE X. It is also further agreed between the parties hereto that any dispute whatsoever growing out of this Agreement shall be referred to three Arbitrators, one to be appointed by each of the parties to this Agreement and the third by the two thus chosen. Each Arbitrator shall be qualified by experience in Engineering and Contracting to perform the duties assigned to him. The decision of any two of these shall be final and binding, and each of the parties to this Agreement shall pay one-half the expense of such reference.

IN WITNESS WHEREOF the parties hereto have executed this Agreement at Pittsburgh, Pa., the day and year first above written. Executed in duplicate.

SCANDINAVIAN-AMERICAN BLDG.

CO.,

By CHARLES DRURY, Prest.,

J. V. SHELDON, Secy.

McCLINTIC-MARSHALL COMPANY,

C. L. MARSHALL, President.

Witness:

G. L. TAYLOR. [31]

Exhibit "B."

"McCLINTIC-MARSHALL COMPANY, a Corporation,

Claimant,

vs.

SCANDINAVIAN-AMERICAN BUILDING COMPANY, a Corporation,

NOTICE OF CLAIM OF LIEN.

NOTICE is hereby given that on the 22d day of May, 1920, McClintic-Marshall Company, a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office in the city of Pittsburgh, in said state, at the request and instance of Scandinavian-American Building Company, a corporation duly organized and existing under and by virtue of the laws of the State of Washington with its principal place of business at Tacoma, commenced to furnish material to the said Scandinavian-American Building Company to be used upon and in the construction of a certain building situate on and covering the whole of Lots ten (10), eleven (11) and twelve (12), block 1003, as the same are shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," which was filed for record in the office of the auditor of Pierce County, Washington Territory, February 3d, 1875, of which property the owner or reputed owner is Scandinavian-American Building Company, the furnishing of which material ceased on October 21st, 1920.

That said material so furnished by claimant to the Scandinavian-American Building Company, a corporation, was of the value of \$263,437.54, upon which amount said Scandinavian-American Building Company, a corporation, is entitled to a credit of \$86,805.17, and there is now due and owing claimant the sum of \$176,632.37 besides interest at the rate of 6% per annum or \$45,820.66 from September 20th, 1920, interest at the rate of 6% per annum on \$95,501.00 from October 20th, 1920, interest at the rate of 6% per annum on \$31,842.94 from November 20th, 1920, and interest at the rate of 6% per annum on \$3,465.76 from December 20th, 1920.

And the undersigned claims a lien upon the property herein described for said sum of \$176,632.37, together with interest at the rate of 6% per annum on the amounts herein specified.

McCLINTIC-MARSHALL COMPANY, a
Corporation,

Claimant,

By HAYDEN, LANGHORNE & METZGER,
Its Attorneys.

State of Washington,
County of Pierce,—ss.

M. A. Langhorne, being first duly sworn, says: I am one of the attorneys for the claimant above-named; I have heard the foregoing claim read, know the contents thereof and believe the same to be true.

M. A. LANGHORNE.

Subscribed and sworn to before me this 24th day of December, 1920.

F. D. METZGER,
Notary Public in and for the State of Washington,
Residing at Tacoma.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Apr. 22, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [32]

**Petition of Tacoma Millwork Supply Co. for
Appointment of Receiver.**

Application of Ann Davis and R. T. Davis, Jr., as Executors of the Estate of R. T. Davis, Deceased, and Ann Davis and R. T. Davis, Jr., et al., Copartners Doing Business as Tacoma Millwork Supply Company, for Appointment of Receiver.

To the Honorable E. E. CUSHMAN, Judge of the District Court of the United States, for the Western District of Washington:

Your petitioners respectively renew their application for the appointment of a receiver of the Scandinavian-American Building Company in any and all of its assets, your orators particularly calling his Honorable Court's attention to the application heretofore made in the answer and cross-complaint of Ann Davis and R. T. Davis, Jr., as Executors of the Estate of R. T. Davis, Deceased; R. T. Davis, Jr., Lloyd Davis; Harry L. Davis; George L. Davis;

Maude A. Davis; Marie A. Davis; Ruth G. Davis; Hattie Davis Tennant and Ann Davis, comprising a partnership acting under the firm name and style of Tacoma Millwork Supply Company, and to the recitals therein contained as to the rights of these your petitioners, and the remedy desired, which cross-complaint was filed and served on or about the 20th day of January, 1921.

2. Your petitioners further respectively call this Honorable Court's attention to the affidavit of R. T. Davis, Jr., one of the members of said partnership and its managing officer, and the recitals therein contained, which are to the effect that the building is deteriorating because of lack of paint, that the steel work for the two last stories is unriveted, a matter of violation of the ordinances of the City of Tacoma, a polity of the State of Washington, and which renders the structure, as to said two stories, dangerous to the passersby; that an officer of the State Court, acting without authority, has assumed ownership over the assets of said Building Company and has without notice or warrant in law sold, for a wholly inadequate price, certain of the assets of said Building Company, and is about to sell other assets to the detriment of the lien claimants, including your petitioners. [33]

3. That your petitioners were the first and sole applicants in any Court having jurisdiction of the subject-matter and the parties, for the appointment of a receiver, and that the interests represented by the receiver sought to be appointed through the State Courts of the State of Washington, which was

under an application subsequent to that of your petitioners, are hostile and adverse to the interests of the claimants for labor and material upon the building of the Scandinavian-American Building Company involved in this suit, in that the Deputy Bank Commissioner, operating under and by and with the advice of the State Bank Commissioner of the State of Washington, is seeking to sequester the assets of said building company in the interest of and for the creditors of the Scandinavian-American Bank, both of which corporations are wholly insolvent, and the said Deputy Bank Commissioner is seeking to exclude from participation in said assets the rightful creditors, namely, the lien claimants upon said building, claiming or purporting to claim that all of said assets are the assets of said Scandinavian-American Bank, but that said assets were at all times held out to be, including said building and ground, the assets of said Scandinavian-American Building Company during the entire period from the time of entering into contract for the delivery of materials and finished work upon said building to the day that said claimants were ordered to cease work and delivery of materials to said building, which coincided with the failure of said Scandinavian-American Bank. [34]

4. That the directorate of both corporations just named was during all times in issue identical, and that said directorate is co-operating with the State Banking Department of the State of Washington adversely to the interest of these claimants in an attempt to sequester the assets of said Building

Company, including the said building and all material for its erection delivered upon the ground or elsewhere for its completion, to the interest of said Bank, and that claimants in addition to those represented by complainant herein and these petitioners are asserting what they believe to be valid and rightful claims in excess of One Hundred Thousand (\$100,000.00) Dollars upon this building, and said assets, and that there is grave danger that by the interference and the sale at inadequate price of said assets, as has already occurred, by the State Banking Department, and the deterioration of said building and because of the danger to passersby as illustrated, that there will be further depletion of said assets unless a receiver be appointed to fully and adequately take care of said assets and to properly safeguard the citizens of Tacoma passing said building.

5. That the said State Bank Commissioner and said Deputy Commissioner, acting for him for said insolvent bank, have refused upon request and are now refusing to deliver over for inspection any of the documents such as minute books of said Building Company and correspondence between said Building Company and one Simpson, who was to but failed to supply a loan of Six Hundred Thousand (\$600,000.00) Dollars under a mortgage subsequent to the mortgage of the Penn Mutual Life Insurance Company, which mortgage of Six Hundred Thousand Dollars the said Banking [35] Department now pretends is a valid mortgage in the hands of the Scandinavian-American Bank, but

which in truth and in fact was originally given to said Simpson and upon which nothing was advanced, and which was assigned in the late fall of 1920 to said Bank, as your petitioners are informed, believe and state the fact to be, without consideration, and which was not recorded until the failure of said Scandinavian-American Bank sometime in January of 1921, at which time and not prior thereto these petitioner and the remaining claimants, as these petitioners are informed, believe and state the fact to be, for the first time heard of the claim of said Scandinavian-American Bank to the said mortgage, and it will be necessary to turn over to said receiver under order of this Court, all of the books, papers and correspondence herein referred to.

WHEREFORE, your petitioners respectfully pray for the appointment of a receiver subject to such bond as this Honorable Court may direct.

FLICK & PAUL,

Attorneys for Ann Davis and R. T. Davis, Jr., as
Executors of the Estate of R. T. Davis, Deceased; R. T. Davis, et al., Copartners Doing
Business Under the Name and Style of Tacoma Millwork Supply Co.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Feb. 23, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [36]

**Order Appointing F. P. Haskell, Jr., Receiver of
American-Scandinavian Building Company—
Dated March 23, 1921.**

This matter coming on regularly to be heard upon the application for the appointment of a receiver for the assets of the defendant, Scandinavian-American Building Company, a corporation, which said application was made by the defendants, Ann Davis and R. T. Davis, Jr., executors of the estate of R. T. Davis, deceased, and Ann Davis and R. T. Davis, Jr., et al., copartners, doing business as the Tacoma Millwork Supply Company, the complainant herein appearing by its attorneys, Messrs. Hayden, Langhorne & Metzger, the applicants appearing by their attorneys herein, Messrs. Flick & Paul, and the defendant, Scandinavian-American Building Company being represented by its attorneys, Messrs. Guy E. Kelly and F. D. Oakley, and the attorneys for the complainant and applicants having presented their petition for the appointment of a receiver, and the defendant, Scandinavian-American Building Company, having filed affidavits in resistance thereof, and the Court having considered the same, and being fully advised in the premises,—

And it appearing to the Court that F. P. Haskell, Jr., is a suitable and competent person to act as such receiver,—

IT IS THEREFORE ORDERED, That F. P. Haskell, Jr., be, and he hereby is appointed receiver of the defendant company, and that said re-

ceiver be, and he is hereby authorized and [37] directed to take possession of all of the property and assets of the defendant of every kind and description; that said receiver be, and hereby is authorized and directed to employ such necessary caretakers and assistants as he may deem necessary to protect the property of defendant during receivership; that said receiver file in this action his oath as such receiver in due form of law, and *the* he file a bond as such receiver as required by law for the faithful performance of the duties involved, the amount of which bond shall be in the sum of \$10,000.00, and shall be approved by this Court.

IT IS FURTHER ORDERED, That Guy E. Kelly be, and he hereby is appointed attorney for said receiver.

Done in open court this 23d day of March, 1921.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 23, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [38]

**Order Making F. P. Haskell, Jr., as Receiver,
Party Defendant—Dated May 21, 1921.**

This cause coming on for hearing upon the motion of Scandinavian-American Building Company, a corporation, one of the above-named defendants, for an order to make Forbes P. Haskell, Jr., the

duly qualified and acting receiver of the Scandinavian-American Building Company, a party defendant to the above-entitled cause, and it appearing to the Court that the said Forbes P. Haskell, Jr., as such receiver, is a necessary party defendant to said action,—

IT IS HEREBY ORDERED that Forbes P. Haskell, Jr., as receiver in possession and charge of the property of the Scandinavian-American Building Company, be and he is hereby made a party defendant to this cause with leave to plead herein.

Dated this 21st day of May, 1921.

EDWARD E. CUSHMAN,

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 21, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [39]

**Order Granting Leave to Sue Receiver—Dated
June 14, 1921.**

It appearing to the Court that, by an order of the said Court, Forbes P. Haskell, was heretofore appointed receiver of the Scandinavian-American Building Company, a corporation, one of the defendants in the above-entitled action, and that by an order made by the above-entitled court on the 21 day of May, 1921, the said receiver was made a party to said action, and was directed to appear and defend all actions or proceedings in said action,

brought by the various holders of liens and encumbrances on the property of the said Scandinavian-American Building Company; and

Whereas it was intended by the said order that the holders of liens and encumbrances on and against the property of the said Scandinavian-American Building Company, involved in the above-entitled action, should have leave and authority of this Court to sue the receiver of the said Scandinavian-American Building Company, for the purpose of foreclosing and enforcing their liens against the property of the said Building Company, and the said order was entered partly for that purpose; and

It appearing to the Court that it would be desirable that the said order should be amended so as to effect the purpose aforesaid, and that an order should be entered to that effect: [40]

NOW, THEREFORE, it is ordered that all persons, and particularly the Far West Clay Company, having claims, demands, liens or encumbrances against the property of the Scandinavian-American Building Company, are hereby authorized and empowered to make Forbes P. Haskell, the receiver thereof, a party to the foreclosure for said liens or encumbrances, in the above-entitled action and to sue the said receiver for the said purpose, and to serve on him the necessary papers, processes, or pleadings, to accomplish said purpose.

This order is hereby made and is to take effect as at the present time, and to relate for this and date back as though it were made on the 21 day of May, 1921.

The receiver of the said Scandinavian-American Building Company, through his attorneys, and McClintic-Marshall Company, a corporation, through its attorneys, having consented to the foregoing order, it is hereby made.

Ordered this 14th day of June, 1921.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 14, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [41]

The undersigned attorneys for McClintic-Marshall Company, complainant in the above-entitled action, and Forbes P. Haskell, receiver of the Scandinavian-American Building Company appearing in the above-entitled action, and his attorneys of record therein,—

Hereby consent to the above and foregoing order of the Court.

McCLINTIC-MARSHALL COMPANY.

By HAYDEN, LANGHORNE & METZGER,

Its Attorneys.

F. P. HASKELL, Jr.,

Receiver of Scandinavian-American Building Company.

F. D. OAKLEY,

KELLY & MacMAHON,

Attorneys for Receiver of the Scandinavian-American Bldg. Co. [42]

Order Permitting Joining of Forbes P. Haskell as Receiver of Scandinavian-American Building Company as Defendant.

On stipulation of Hayden, Langhorne & Metzger, counsel for complainant, and F. D. Oakley and Kelly & MacMahon, attorneys for Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company.

IT IS HEREBY ORDERED that Forbes P. Haskell as receiver of the Scandinavian-American Building Company, be and he is hereby made a party defendant herein, and that paragraph 15 of the amended and supplemental bill of complaint be amended, including therein after the word "Commissioner" in the 3d line of page 5, the following: "Forbes P. Haskell as Receiver of the Scandinavian-American Building Company."

Done in open court this 27th day of June, 1921.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. June 27, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [43]

Answer of Defendants, Scandinavian-American Building Company and Forbes P. Haskell, Jr., Its Receiver.

Now come the defendants Scandinavian-American Building Company, a corporation, one of the defendants above named, and Forbes P. Haskell, Jr., the duly appointed, qualified and acting receiver of the said Scandinavian-American Building Company, by leave of Court first had and obtained to be made a party defendant in this action, and for their answer to complainant's amended and supplemental bill of complaint, specifically admit each and all of the allegations in said amended and supplemental bill of complaint contained, except as hereinafter qualified, or specifically denied. Said admission is intended to be of the same force and effect as if the allegations of the bill were herein repeated at length, save only as the same are herein modified or denied.

I.

Answering paragraph XV these defendants admit that between the 5th day of February 1920, and October 21st, 1920, the complainant delivered to the Scandinavian-American Building Company, a certain part of the structural steel called for in said contract but specifically deny that the value of the steel so furnished was of the sum of \$263,437.54, or any other sum in excess of \$260,000.00, and allege that the Scandinavian-American Building Company paid to said complainant the sum of \$87,-814.34 to be applied on the purchase price of said

structural steel. These defendants deny that the structural steel called for in said contract was delivered to the Scandinavian-American Building Company in accordance with terms of said contract, and allege [44] that a part of the structural steel furnished and delivered was defectively fabricated and could not be used in the construction of the said building without many changes and alterations, which changes and alterations were made by the Scandinavian-American Building Company at a great expense to it.

That defendants further allege that by reason of the failure and refusal of the complainant to deliver the structural steel in accordance with the terms of said contract, and within the period provided in said contract for the delivery of said steel, the said Scandinavian-American Building Company suffered great loss and damage and that by the terms of Article X of the Contract marked Exhibit "A," and made a part of complainant's amended and supplemental bill of complaint, the above matters in dispute were to be arbitrated according to the method provided in said Article X, and that the defendant, Scandinavian-American Building Company, demand that said matters in dispute be submitted to arbitration, and that the complainant refused so to do, by reason whereof these defendants deny that the complainant is entitled to recover any sum of money whatever from these defendants until the terms and conditions of said contract are fully complied with, and these defendants specifically deny that *that* there is now

due to the complainant, for material so furnished to the Scandinavian-American Building Company, in accordance with the terms of said contract, the sum of \$176,632.37, with interest at the rate of 6% per annum on \$45,820.66 from September 20, 1920, on \$95,501.00 from October 20, 1920, on \$31,842.94 from November 20, 1920, and on \$3,465.76 from December 20, 1920, or any other sum or sums whatsoever. [45]

II.

These defendants answering paragraph XVII of complainant's amended and supplemental bill of complaint admit that the complainant filed, or caused to be filed and recorded with the County Auditor of Pierce County, Washington, a claim of lien, but these defendants specifically deny that on the date of the filing of said claim of lien, to wit, the 24th day of December, 1920, there was due from the Scandinavian-American Building Company to said complainant, the sum of \$176,632.37 with interest from the dates, and on the amounts as specified in the amended bill of complaint, or any other sum, or sums, whatever, and allege that at the time of filing said lien, the said complainant was without right or authority in law to claim, or to file or record, any lien whatsoever against the said premises of the defendant, Scandinavian-American Building Company.

III.

These defendants for answer to paragraph XVIII of complainant's amended and supplemental bill of complaint, admit that the various

persons, firms and corporations mentioned in said paragraph claim to have some right, title, lien or interest in, or to said premises, but these defendants deny that any one of said persons, firms or corporations have any right, title, lien or interest in, or to said premises, and require strict proof thereof.

IV.

These defendants answering paragraph XIX of said complainant's amended and supplemental bill of complaint deny that the complainant is entitled to an allowance of a reasonable attorneys fee herein, or of any attorneys fee whatsoever, [46] and specifically deny that a reasonable attorneys fee in the premises is in the sum of \$15,000.00, or in any other sum whatsoever.

V.

These defendants further answering, allege that the amended and supplemental bill of complaint shows that the lien claimed by the complainant herein is claimed to exist under and by virtue of Section 1134 of Remington's Code and Statutes of the State of Washington, and these defendants say that under and by virtue of said Codes and Statutes of said State, there can be maintained but one cause of action for the foreclosure of any lien or liens upon the building in controversy in this suit. That there are many lien claimants whose claims against the defendant Scandinavian-American Building Company, are less than the sum of \$3,000.00 and that by reason thereof this court

has no jurisdiction to determine the matter in controversy.

And the defendants, Scandinavian-American Building Company and Forbes P. Haskell, Jr., the duly appointed, qualified and acting Receiver thereof, without conceding or admitting the jurisdiction of this Court to hear and determine the amended and supplemental bill of complaint, but specifically denying the same, and also without conceding the right or authority in law or equity, on the part of the complainant to maintain its cause of action against these defendants, or either of them, by reason of the failure and refusal of the said complainant to arbitrate the matter in dispute, as provided for in Article X of Exhibit "A," attached to complainant's amended and supplemental bill of complaint, and made a part thereof, but specifically denying the same, by way of [47] counterclaim and further answer, alleges as follows:

I.

That under the terms of the written contract entered into between the complainant and the defendant, Scandinavian-American Building Company, a copy of which is marked Exhibit "A" and made a part of the amended and supplemental bill of complaint herein, the complainant undertook and agreed to begin shipment of the structural steel specified in said contract within sixty days from the date thereof, to wit: February 5th, 1920, and to make complete shipments of said material within one hundred and twenty days after said date.

That the said complainant failed and refused to make shipments of said material according to the terms of said contract and willfully delayed shipment thereof for a period of five months after the time the shipment should have been completed. That during the month of September, 1920, the freight rates on said material greatly increased and by reason thereof, the Scandinavian-American Building Company was compelled to pay, and did pay, an excess in freight rates, over that which they would have been compelled to pay had the complainant shipped the steel within the time provided in said contract, in the sum of \$14,052.76.

II.

That the said steel when delivered was not fabricated according to the plans and specifications agreed upon by the parties to said contract, and that it was necessary for the said Scandinavian-American Building Company to make alterations and changes in said steel in order to make the same comply with the said plans and specifications, all [48] to the cost and damage of the Scandinavian-American Building Company in the sum of \$3,000.00.

III.

That on account of the failure and refusal of the complainant to furnish said structural steel within the time limit provided for said delivery, in said contract, the said Scandinavian-American Building Company sustained a great loss in rentals and in interest on capital invested, to wit, the sum of \$50,000.00, and that by reason of the said breach

of said contract, as herein set forth, the defendant Scandinavian-American Building Company sustained loss and damages in the sum of \$67,052.76. That the said defendant made repeated demands for adjustment and arbitration of the said matters in dispute, and that the complainant failed and refused, and still fails and refuses to submit the same to arbitration.

WHEREFORE these defendants pray that said amended and supplemental bill of complaint be dismissed and that these defendants have judgment for their costs, attorney fees and disbursements in this action, and that such further relief be granted them as to the Court may seem just.

GUY E. KELLY,

THOS. MacMAHON,

F. D. OAKLEY,

Attorneys for Said Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 23, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [49]

**Motion of McClintic-Marshall Company to Strike
Part of Answer of Scandinavian-American
Bank of Tacoma et al.**

Comes now McClintic-Marshall Company, a corporation, complainant in the above-entitled action, and moves this Court for an order as follows:

I.

For an order striking paragraph I of the affirmative defense as contained in the answer of Scandinavian-American Bank of Tacoma, a corporation, and J. P. Duke, as supervisor of banks of the state of Washington, which paragraph reads as follows:

“The cross-complainants submit to the judgment of this Honorable Court, and insist that this suit is altogether unnecessary and vexatious and that, even if the plaintiff be entitled to the sum alleged by it to be due from said defendant, the Scandinavian-American Building Company, the complainant herein is barred from asserting such rights in this action under Article X of the contract, marked Exhibit ‘A’ and attached to its amended and supplemental bill of complaint herein, for the reason that the claims of the complainant are now and have at all times been disputed and that the complainant herein has repeatedly refused to abide by the terms of said contract, and particularly by the terms of said Article X, and submit such disputes to arbitration, as therein provided, and that the complainant herein, by reason thereof and by reason of its breaches of said contract referred to in its amended and supplemental bill of complaint herein, has not done equity, and has not come into this court with clean hands, and it is entitled to no equity at the hands of this court.” [50]

This motion to strike is based on the ground that

the matter moved against does not constitute a defense to this action.

HAYDEN, LANGHORNE & METZGER,
Attorneys for Complainant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 24, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [51]

Order Granting Motion of McClintic-Marshall Company to Strike Part of Answer of Scandinavian-American Building Company et al.

Came on this cause to be heard on the motion of McClintic-Marshall Company, a corporation, complainant, to strike certain portions of paragraphs 1 and 2 and all of paragraph 5 of the answer and to strike paragraphs 1 and 3 of the counterclaim as contained in the answer of Scandinavian-American Building Company, a corporation, and Forbes P. Haskell, Jr., receiver of the Scandinavian-American Building Company; Hayden, Langhorne & Metzger appearing on behalf of the complainant and in support of the motion and Frank D. Oakley and Kelly & MacMahon appearing on behalf of the Scandinavian-American Building Company, a corporation, and Forbes P. Haskell, Jr., receiver of the Scandinavian-American Building Company, in opposition thereto.

After argument of the counsel and the submission of briefs, the Court not being duly advised in the

premises, took said motion under consideration until a later date.

NOW, on this —— day of June, 1921, the Court being duly advised in the premises,—

IT IS ORDERED, ADJUDGED AND DECREED that all of that portion of paragraph 1 of the answer which reads as follows:

“These defendants further allege that by reason of the failure and refusal of the complainant to deliver the structural steel in accordance with [52] the terms of said contract, and within the period provided in said contract for the delivery of said steel, the said Scandinavian-American Building Company suffered great loss and damage and that by the terms of Article X of the Contract, marked Exhibit ‘A’ and made a part of the complainant’s amended and Supplemental Bill of Complaint the above matters in dispute were to be arbitrated according to the method provided in said Article X and that the defendant, Scandinavian-American Building Company, demanded that said matters in dispute be submitted to arbitration, and that complainant refused so to do, by reason whereof these defendants deny that the complainant is entitled to recover any sum of money whatever from these defendants until the terms and conditions of said contract are fully complied with.”

be and the same is hereby stricken and that all that portion of paragraph 2 of the answer which reads as follows:

“and allege that at the time of filing said lien, the said complainant was without right or authority in law to claim, or to file or record, any lien whatsoever against the said premises of the defendant, Scandinavian-American Building Company.”

be and the same is hereby stricken; and that all of paragraph 5 of the answer be and the same is hereby stricken, and that all of paragraph 3 of the counterclaim be and the same is hereby stricken, excepting the motion to strike paragraph 1 of the counterclaim is hereby denied and overruled.

To the action of the Court in striking the portions of the answer and counterclaim moved against the defendants Scandinavian-American Building Company, a corporation, and Forbes P. Haskell, Jr., receiver of the Scandinavian-American Building Company, by its attorneys duly excepted and that exception is allowed.

To the action of the Court in refusing to strike all of paragraph 1 of the counterclaim the complainant duly excepted and its exception is allowed.

Done in open court this 27th day of June, 1921.

EDWARD E. CUSHMAN,

Judge. [53]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 27, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [54]

Reply to Answer of Scandinavian-American Building Company and Forbes P. Haskell, Its Receiver.

Comes now McClintic-Marshall Company, a corporation, complainant in the above-entitled action, and for reply to so much of the answer of the Scandinavian-American Building Company and Forbes P. Haskell as it is advised it is necessary and material for it to reply to, says:

I.

For reply to that part of paragraph I which alleges that the structural steel furnished and delivered by complainant to the Scandinavian-American Building Company was defectively fabricated and could not be used in the construction of the building without many changes, this complainant says that it denies each and every of said allegations and charges and the whole thereof.

The complainant for its reply to the counterclaim as contained in the answer of the Scandinavian-American Building Company and Forbes P. Haskell, its receiver, says:

I.

It admits that under the terms of the written contract entered into between this complainant and the defendant Scandinavian-American Building Company the complainant undertook [55] and agreed to begin shipment of the structural steel which it was to furnish to the Building Company within 60 days from February 5, 1920, and it also agreed to make complete shipments of all material

called for in said contract within 120 days after the date of said contract, but it was also provided in said contract that complainant's undertaking to commence shipment of the structural steel within 60 days after February 5, 1920, and to complete the same within 120 days from said February 5, 1920, was conditioned upon the Scandinavian-American Building Company within five days after the date of said agreement, to wit, within five days after February 5, 1920, furnishing complainant with plans and specifications and all data required for the manufacture of the fabricated steel required by the Building Company, which plans, specifications and data were to be furnished the complainant by Frederick Webber, architect, for the construction of the building that was in process of erection by defendant Scandinavian-American Building Company, and this complainant alleges and avers that said Scandinavian-American Building Company did not, within five days after February 5, 1920, or for a long time thereafter, furnish this complainant with the required data for the manufacture of the fabricated steel that complainant was required to furnish to said Building Company, and any and all delay in commencing to ship or in completing the shipment of the structural steel work to defendant Scandinavian-American Building Company was due to the fault and neglect of the said Building Company, its officers and agents, to comply with the provisions of the contract of February 5, 1920, in furnishing to complainant the data required for the structural steel work that it [56] desired to make use of in

the construction of its building in Tacoma, Washington.

And complainant further alleges and avers the fact to be that if the Scandinavian-American Building Company was, on account of the delay in shipping the structural steel work, compelled to pay the sum of \$14,052.76 in freight rates in excess of what it would have been compelled to pay had the structural steel work been all shipped within 120 days after February 5, 1920, such excess payment was wholly due to the fault and neglect of the said Scandinavian-American Building Company in failing to observe that provision of the contract requiring it to furnish to complainant within five days after February 5, 1920, the required data for the manufacture of the structural steel work, but as to whether or not the said Scandinavian-American Building Company was compelled to pay the sum mentioned on account of the advance in freight rates, this complainant has no knowledge or information sufficient to form a belief and demands strict proof thereof.

Further replying to said paragraph your complainant alleges and avers the fact to be that it is provided in and by said contract that this complainant would ship all the material mentioned and described in said contract within 120 days after February 5, 1920, provided that it was not obstructed or delayed "by any act, neglect or default of the purchaser or their employees or agents, or by the Rolling Mills, transportation, strikes, fires, storms, floods or other causes beyond the reasonable

control of the contractor.” And complainant alleges that in addition to the reason heretofore given as to why it did not ship all of the structural [561½] steel work within 120 days after February 5, 1920, it was also delayed in the shipment of said structural steel work by reason of the strike among the employees of all the railroad companies centering in and running out of Pittsburgh, Pennsylvania, and the state of Pennsylvania, which strike of said employees extended over a period of sixty days and it was impossible during the period of the strike of the employees of the railroad or railway companies to make any shipments and was a cause that was beyond the control of this complainant.

II.

For reply to the second paragraph of the counterclaim this complainant says that it denies the same and the whole thereof and each and every allegation therein contained, and denies that by reason of any of the matters and things alleged in said paragraph Scandinavian-American Building Company was damaged in the sum of \$3000, or in any other sum or sums whatsoever.

WHEREFORE, having made a full reply to the answer and counterclaim of the said Scandinavian-American Building Company and Forbes P. Haskell, its receiver, this complainant prays for a decree in conformity with the prayer of its amended and supplemental complaint.

E. M. HAYDEN,

M. A. LANGHORNE,

F. D. METZGER,

Solicitors for Complainant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 1, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [57]

Answer and Cross-complaint of J. P. Duke and Scandinavian-American Bank of Tacoma. [58]

The defendants, Scandinavian-American Bank of Tacoma, a corporation, and J. P. Duke, as Supervisor of Banks of the State of Washington, and as successor in office to the defendant, Claude P. Hay, as State Bank Commissioner for the State of Washington, in answer to the amended and supplemental bill of complaint of the McClintic-Marshall Company, a corporation, aver:

I.

That the statements contained in the paragraphs numbered respectively I, IV, V, VII, VIII, IX, X, XI, XII, XIII and XX are true, as this cross-complainant is informed and believes.

II.

That these cross-complainants have no personal knowledge of the contract marked Exhibit "A" attached to the amended and supplemental bill of complaint herein, and, for greater certainty, crave leave to refer to the said contract when produced.

III.

These cross-complainants deny that the complainant herein, McClintic-Marshall Company, delivered to the Scandinavian-American Building Company the structural steel called for in said

contract in accordance with the terms of said contract, and deny that there is due from the Scandinavian-American Building Company in accordance with the terms of said contract the sum of \$175,-632.37, with interest, or any other sum whatsoever, and demand strict proof thereof, and deny that the complainant herein, McClintic-Marshall Company, has any lien whatsoever upon the real property described in said amended and supplemental bill of complaint and in said Exhibit "B" attached to said amended and supplemental bill of complaint, and deny that the rights, liens and interests in or to said property now vested in J. P. Duke, as Supervisor of Banks of the State of Washington, are junior, subsequent or inferior to the lien of the complainant or any other firm, corporation or individual whatsoever, and deny that the sum of \$15,000.00, or any other sum whatsoever, should be allowed to the complainant as attorney's fees herein.

By way of defense against the amended and supplemental bill of complaint of the plaintiff herein,

I.

The cross-complainants submit to the judgment of this Honorable Court, and insist that this suit is altogether unnecessary and vexatious and that, even if the plaintiff be entitled to the sum alleged by it to be due from said defendant, the Scandinavian-American Building Company, the complainant herein is barred from asserting such rights in this action under Article X of the contract, marked Exhibit "A" and attached to its amended and

supplemental bill of complaint herein, for the reason that the claims of the complainant are now and have at all times been disputed and that the complainant herein has repeatedly refused to abide by the terms of said contract, and particularly by the terms of said Article X, and submit such disputes to arbitration, as therein provided, and that the complainant herein, by reason thereof and by reason of its breaches of the said contract referred to in its amended and supplemental bill of complaint herein, has not done equity, and has not come into this court with clean hands, and it is entitled to no equity at the hands of this Court.

The Scandinavian-American Bank of Tacoma and J. P. Duke, as Supervisor of Banks of the State of Washington in charge of the liquidation of the Scandinavian-American Bank of Tacoma, by way of cross-bill herein against the plaintiff, McClintic-Marshall Company, a corporation, and by way of a bill of complaint against F. P. Haskill, Jr., as Receiver of the Scandinavian-American Building Company, a corporation; Ann Davis and R. T. Davis, Jr., as executors of the estate of R. A. Davis, deceased; R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company; G. Wallace Simpson; Savage-Scotfield Company, a corporation; Puget Sound Iron & Steel Works, a corporation; E. E. Davis & Company, a corporation; St. Paul & Tacoma Lumber Company, a corporation; Far West

Clay Company, a corporation; Henry Mohr Hardware Co., Inc., a corporation; Hunt & Mottet Company, a corporation; Edward Miller Cornice & Roofing Company, a corporation; Washington Brick, Lime & Sewer Company, a corporation; Otis Elevator Company, a corporation; U. S. Machine & Engineering Co., Inc., a corporation; Colby Star Manufacturing Company, a corporation; Tacoma Shipbuilding Company, a corporation; Crane Company, a corporation; Ben Olson Company, a corporation; H. C. Greene, doing business as H. C. Greene Iron Works; Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company; S. O. Matthews and Frank L. Jones, copartners doing business under the firm name and style of City Lumber Agency; J. D. Mullins, doing business as J. D. Mullins Bros.; S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company; M. Kleiner, doing business as Liberty Lumber & Fuel Company; J. A. Soderberg, doing business as West Coast Monumental Company; Theodore [59] Hedlund, doing business as Atlas Paint Company; F. H. Madsen and Gustaf Jonason, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed. Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swan-

son, William Griswold, O. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, George W. Hicks, Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal; Sherman Wells, Carl J. Gerring, George Gerring, F. R. Schoen, Adolph W. Aufang, C. H. Boedecker, William L. Owens, F. H. Godfrey, W. T. Morris, Samuel Rothstein and Frederick Webber, aver:

I.

That prior to the 15th day of January, 1921, the Scandinavian-American Bank of Tacoma was a corporation, organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business at Tacoma, Washington, and authorized under such laws to do a general banking business in the City of Tacoma, and State of Washington, and was engaged in the conduct of such business; that on the 15th day of January, 1921, the said Scandinavian-American Bank of Tacoma was adjudged to be insolvent, and its assets and affairs thereby came into the possession of Claud P. Hay, as State Bank Commissioner for the State of Washington, for liquidation, and remained in the hands of the said Claude P. Hay, as such Commissioner, and in course of liquidation until the 1st day of April, 1921, when the assets and affairs of the said insolvent banking corporation came into the hands of cross-complainant, J. P. Duke, as Supervisor of Banks of the State of Washington, for liquidation.

II.

That since the said 1st day of April, 1921, said cross-complainant has been and now is the Supervisor of Banks of the State of Washington, and as such has been and now is in charge of the liquidation of the Scandinavian-American Bank of Tacoma, an insolvent banking corporation, and as such and for such purpose is authorized and empowered under the laws of the State of Washington to reduce the assets of the said insolvent banking corporation to cash, and to maintain actions in his own name for such purpose.

III.

That the defendant Scandinavian-American Building Company is a corporation organized and existing under the laws of the State of Washington, and a citizen of said state, and a resident of the southern division of the Western District of Washington; that on February 15, 1921, in the above-entitled action, F. P. Haskell was appointed receiver of such corporation, and has duly qualified as such and is now duly acting as such.

IV.

That the defendant Scandinavian-American Bank of Tacoma is a corporation organized and existing under the laws of the State of Washington, and a citizen of said state, and a resident of the southern division of the Western District of the State of Washington.

V.

On information and belief the defendants Ann Davis and R. T. Davis, Jr., as executors of the

estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis constitute a copartnership, doing business in Tacoma, Washington, under the name and style of Tacoma Millwork Supply Company, and all of said named defendants, with the exception of Hattie Davis Tennant, are citizens of the State of Washington, and the said Hattie Davis Tennant is a citizen of the State of California.

VI.

On information and belief the defendant G. Wallace Simpson is a citizen of the State of Pennsylvania.

VII.

That the defendant Frederick Webber is a citizen and resident of the State of Pennsylvania.

VIII.

On information and belief the defendants Savage-Seofield Company, Puget Sound Iron & Steel Works, E. E. Davis & Company, St. Paul and Tacoma Lumber Company, Far West Clay Company, Henry Mohr Hardware Company, Inc., Hunt & Mottet, Edward Miller Cornice [60] & Roofing Company, Washington Brick, Lime & Sewer Company, United States Machine & Engineering Company, Colby Star Manufacturing Company, Tacoma Shipbuilding Company and Ben Olson Company are all corporations organized and existing under the laws of the State of Washington and citizens of said state.

IX.

On information and belief Otis Elevator Company is a corporation, duly organized and existing under and by virtue of the laws of the State of New Jersey and a citizen of said state, but has been admitted to do business in the State of Washington by virtue of having complied with the laws of the State of Washington relative to foreign corporations.

X.

On information and belief the defendant Crane Company is a corporation, duly organized and existing under and by virtue of the laws of the State of Illinois and a citizen of said state, but has been admitted to do business in the State of Washington by virtue of having complied with the laws of said State of Washington relative to foreign corporations.

XI.

On information and belief the defendant H. C. Greene, doing business as H. C. Greene Iron Works, the defendant J. D. Mullins, doing business as J. D. Mullins Bros., S. O. Matthews and Frank L. Johns, a copartnership doing business under the name of City Lumber Agency, Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company, Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal, S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company, Morris Kleiner doing business as

Liberty Lumber & Fuel Company, J. A. Soderberg doing business as West Coast Monumental Company, Theodore Hedlund doing business as the Atlas Paint Company, are all citizens of the State of Washington and residents of the southern division of the Western District of Washington.

XII.

On information and belief the defendants F. W. Madson, Gustaf Jonasson, N. A. Hanson, A. J. Van-Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed. Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, O. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, Sherman Wells, Carl G. Gerring, George Gerring, F. R. Schoen, A. W. Aufang, C. H. Broedecker, William L. Owens, F. H. Godfrey and W. E. Morris, and Samuel Rothstein, are each and every one of them citizens of the State of Washington and residents of the southern division of the Western District of Washington.

XIII.

Further, cross-complaints aver that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of \$3,000.00

XIV.

That on September 2d, 1910, J. E. Chilberg and Anna M. Chilberg, his wife, were the owners of cer-

tain real property in Pierce County, Washington, described as lots 11 and 12, in block 1003, in the City of Tacoma, and shown and designated upon that certain plat entitled "Map of New Tacoma, Washington Territory," which plat was filed for record in the office of the Auditor of said Pierce County, Washington, on February 3, 1875; that on said date, the said J. E. Chilberg and Anna Chilberg, for a valuable consideration, and in order to secure the payment of the principal and interest of a promissory note in the sum of \$100,000.00 then made and delivered, when the same should become due and payable, and to secure the performance and observance of all the covenants and agreements and conditions on the part of the said J. E. Chilberg and Anna M. Chilberg, his wife, contained in the mortgage hereinafter mentioned, made, executed and delivered to the Penn Mutual Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, a mortgage wherein and whereby they mortgaged to the said Penn Mutual Life Insurance Company the real estate situated in Pierce County, State of Washington, above described.

XV.

That a true copy of said mortgage so made, executed and delivered to the said Penn Mutual Life Insurance Company, is attached to this cross-bill of complaint and marked Exhibit "W" and cross-complainants pray that this said copy marked Exhibit "W" shall be taken in all respects as if it were

fully and specifically set forth in the body of this cross bill of complaint. [61]

XVI.

That the said mortgage was duly filed for record in the office of the Auditor of Pierce County, Washington, on September 23d, 1910, at 3:46 P. M., and was recorded in book 165 of Record of Mortgages, Pierce County, Washington, on page 452.

XVII.

That on October 27th, 1915, the said J. E. Chilberg and Anna M. Chilberg, his wife, and the said "The Penn Mutual Life Insurance Company," a corporation, in the due exercise of the powers and authority by it in that behalf possessed, made and entered into an agreement for the extension of time of payment of the said mortgage, above described, and referred to herein as Exhibit "W," wherein and whereby it was agreed that the time for the payment of the said principal sum of \$100,000.00 should be due and payable as follows:

\$10,000.00 on September 1st, 1916;

10,000.00 on September 1st, 1917;

5,000.00 on September 1st, 1918;

5,000.00 on September 1st, 1919;

70,000.00 on September 1st, 1920;

with interest at the rate of five and one-half per cent ($5\frac{1}{2}\%$) per annum from September 1st, 1915, until maturity, and at twelve per cent (12%) per annum from maturity until paid; which said agreement was duly filed for record in the office of the Auditor of Pierce County, Washington, on No-

vember 15th, 1915, at 2:35 P. M., and is of record in the office of the said Auditor.

XVIII.

That on the 2d day of March, 1921, the said Penn Mutual Life Insurance Company, a corporation, in the exercise of the powers and authority by it in that behalf possessed, and for a valuable consideration, endorsed the said note and sold, assigned and transferred the mortgage above described and referred to herein as Exhibit "W" to the cross-complainant, J. P. Duke, as such Supervisor of Banks, and he is now the owner and holder thereof.

XIX.

That the principal of the said mortgage with interest, according to the terms thereof, and according to the agreement of extension of time hereinabove referred to, is now due and that there is now due and payable on the said note and mortgage the sum of \$70,000.00 and interest thereon at the rate of 12 per cent per annum from September 1st, 1920, until paid.

XX.

That the said note and mortgage expressly provide that any moneys paid by the mortgagee for the certifications to date of the abstracts of title and tax histories of the mortgaged premises, in case of default should be a further lien on the said premises under said mortgage, and that this plaintiff has expended the sum of \$150.00 for certificates to date of the abstracts of title and tax histories of said mortgaged premises.

XXI.

That in said note and mortgage it is expressly agreed that, in case any action or proceeding is brought upon said note or to foreclose said mortgage, the mortgagee shall be entitled to an attorney's fee therein equal to ten per cent of the amount due and that such attorney's fees shall be a lien upon said land secured by said mortgage; the cross-complainants aver that the sum of \$7,000.00 is a reasonable attorney's fee to be allowed him in this said matter.

XXII.

That no proceedings have been had in law or otherwise, and that no other action is being brought for the recovery of the said sum secured by said note and mortgage or for the recovery of the said mortgage debt, or any part thereof.

XXIII.

This cross-complainant further shows, upon information and belief that the defendants, F. P. Haskell, Jr., as receiver of the Scandinavian-American Building Company, a corporation; Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased; R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tenant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Company; G. Wallace Simpson; Savage-Scofield Company, a corporation; Puget Sound Iron & Steel Works, a corporation; E. E. Davis & Company, a corporation; St. Paul & Tacoma Lumber Company, a corporation; Far West Clay Company, a corpora-

tion; Henry Mohr Hardware Company, Inc., a corporation; Hunt & Mottet [62] Company, a corporation; Edward Miller Cornice & Roofing Company, a corporation; Washington Brick, Lime & Sewer Company, a corporation; Otis Elevator Company, a corporation; U. S. Machine & Engineering Company, Inc., a corporation; Colby Star Manufacturing Company, a corporation; Tacoma Shipbuilding Company, a corporation; Crane Company, a corporation; Ben Olson Company, a corporation; H. C. Greene, doing business as H. C. Greene Iron Works; Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company; S. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency; J. D. Mullins doing business as J. D. Mullins Bros.; S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company; M. Kleiner, doing business as Liberty Lumber & Fuel Company; J. A. Soderberg, doing business as West Coast Monumental Company; Theodore Hedlund, doing business as Atlas Paint Company; F. H. Madsen and Gustaf Jonason, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William

Griswold, O. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, George W. Hicks, Robert W. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal; Sherman Wells, Carl J. Gerring, George Gerring, F. R. Schoen, Adolph W. Aufang, C. H. Boedecker, William L. Owens, F. H. Godfrey, W. E. Morris, Frederick Webber, and Samuel Rothstein, have, or claim to have, some interest in or claim upon the said mortgaged premises, or some part thereof, but cross-complainants aver that the interest of the said defendants, if any, is inferior, subject and subsequent to the lien of cross-complainants by virtue of the said note and mortgage hereinabove set forth.

And the said Scandinavian-American Bank of Tacoma and J. P. Duke as Supervisor of Banks of the State of Washington, as a second cross-bill of complaint against the plaintiff herein, and against the defendants, F. P. Haskell, Jr., as receiver of the Scandinavian-American Building Company, a corporation; Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased; R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company; G. Wallace Simpson; Savage-Scofield Company, a corporation; Puget Sound Iron & Steel Works, a corporation; E. E. Davis & Company, a corporation; St. Paul & Tacoma Lumber Company, a corporation; Far

West Clay Company, a corporation; Henry Mohr Hardware Company, Inc., a corporation; Hunt & Mottet Company, a corporation; Edward Miller Cornice & Roofing Company, a corporation; Washington Brick, Lime & Sewer Company, a corporation; Otis Elevator Company, a corporation; U. S. Machine & Engineering Company, a corporation; Colby Star Manufacturing Company, a corporation; Tacoma Shipbuilding Company, a corporation; Crane Company, a corporation; Ben Olson Company, a corporation; H. C. Greene, doing business as H. C. Greene Iron Works; Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company; S. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency; J. D. Mullins doing business as J. D. Mullins Bros.; S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company; M. Kleiner, doing business as Liberty Lumber & Fuel Company; J. A. Soderberg, doing business as West Coast Monumental Company; Theodore Hedlund, doing business as Atlas Paint Company; F. H. Madsen and Gustaf Jonason, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcel-

lino, M. Swanson, William Griswold, O. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Petterly, Thomas S. Short, George W. Hicks, and Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal; Sherman Wells, Carl J. Gerring, George Gerring, F. R. Schoen, Adolph W. Aufang, C. H. Boedecker, Williams L. Owens, Frederick Webber, F. H. Godfrey, W. E. Morris and Samuel Rothstein aver:

I.

These cross-complainants reallege the allegations contained in paragraphs I to XIII, inclusive, as set forth in his first bill of complaint hereinabove, and make the same a part of this, the second cross-bill of complaint herein, as fully and to all intents and purposes as though the same were set forth herein verbatim.

II.

That prior to November 10th, 1919, lot 10, block 1003, as the same is known and designated upon a certain plat entitled "Map of Tacoma, W. T.," filed for record with the Auditor of Pierce County, Washington, on February 3d, 1875, was in "Drury, the Tailor, Incorporated," a corporation organized and existing under and by virtue of the laws of the State of Washington; and that on said date the said Scandinavian-American Bank of Tacoma, at the instance [63] and request of the Scandinavian-American Building Company, and in consideration of the contract hereinafter referred to, paid to the said corporation, "Drury, the Tailor, Incor-

porated," the sum of \$65,000.00, and in consideration thereof the said corporation, "Drury, the Tailor, Incorporated," deeded the said lot to the Scandinavian-American Building Company; that at such time the title to lots 11 and 12 in block 1003, "Map of New Tacoma, W. T.," was in the said Scandinavian-American Bank of Tacoma, a corporation, and the said Scandinavian-American Bank of Tacoma, on February 25th, 1920, deeded the said lots 11 and 12, block 1003, to the said Scandinavian-American Building Company, a corporation, in consideration of the agreement of the said Scandinavian-American Building Company, a corporation, to deliver to the said Scandinavian-American Bank of Tacoma bonds of the par value of \$350,000.00, bearing interest at the rate of 6% per annum, payable semi-annually, and secured by a second mortgage upon lots 10, 11 and 12, block 1003, "Map of New Tacoma, W. T.," situated in Pierce County, Washington; that it was a part of the second agreement that said mortgage bonds should be delivered to the said Scandinavian-American Bank of Tacoma, within a period of four months from the 10th day of February, 1920, and that the said Scandinavian-American Building Company should finance the erection of a sixteen-story building and provide the ground floor thereof with space and accommodation for a metropolitan banking institution, which space was reserved for the use of the Scandinavian-American Bank of Tacoma, upon a rental to be thereafter agreed upon, and that for the purpose of financing the construction and erection of

the said building a first mortgage in the sum of \$600,000.00 should be executed by the said Scandinavian-American Building Company upon all three lots, which said mortgage should be executed and recorded before actual construction should begin and before any of the contracts for such construction should have been let, and a series of second mortgage bonds of the total par value of \$750,000.00 should be executed and secured by a second mortgage on the said premises, of which bonds, bonds of the par value of \$350,000.00 should be delivered, as above set forth, which said agreement was in writing, and that a true copy of said agreement is annexed to this cross-bill of complaint and marked Exhibit "X," and these cross-complainants pray leave that the said copy marked Exhibit "X" may be taken in all respects as if it were fully and specifically set forth in the body of this second cross-bill of complaint.

III.

That the said Scandinavian-American Building Company never in fact executed the second mortgage which it agreed to execute under the terms of the said agreement attached hereto and marked Exhibit "X," nor did it ever issue and deliver the bonds therein provided for, and that such agreement was not put of record in the office of the Auditor of Pierce County, Washington, in reliance upon the agreements of the contractors furnishing labor and material upon such building whereby the right to file liens thereon was waived.

IV.

That said Scandinavian-American Bank of Tacoma, by virtue of the premises and by virtue of the transfer to the Scandinavian-American Building Company of the real property above described, is entitled in equity to a lien in the nature of a purchase money mortgage on said premises in accordance with the terms of said agreement attached hereto and marked Exhibit "X."

V.

That no other proceeding at law or otherwise has been brought for the establishment of said lien or the foreclosure thereof.

VI.

That the cross-complainant further shows upon information and belief that the plaintiff, McClintic-Marshall Company, a corporation, and the defendants, F. P. Haskell as receiver of the Scandinavian-American Building Company, a corporation; Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased; R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company; G. Wallace Simpson; Savage-Scofield Company, a corporation; Puget Sound Iron & Steel Works, a corporation; E. E. Davis & Company, a corporation; St. Paul & Tacoma Lumber Company, a corporation; Far West Clay Company, a corporation; Henry Mohr Hardware Company, Inc., a corporation, Hunt & Mottet

Company, a corporation; Edward Miller Cornice & Roofing Company, a corporation; Washington Brick, Lime & Sewer Company, a corporation; Otis Elevator Company, a corporation; U. S. Machine & Engineering Company, a corporation; Colby Star Manufacturing Company, a corporation; Tacoma Shipbuilding Company, a corporation; Crane Company, a corporation; Ben Olson Company, a corporation; H. C. Greene, doing business as H. C. Greene Iron Works; Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company; S. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency; J. D. Mullins, doing business as J. D. Mullins Bros.; S. J. Pritchard and C. H. Graves, copartners [64] doing business as P. & G. Lumber Company; M. Kleiner, doing business as Liberty Lumber & Fuel Company; J. A. Soderberg, doing business as West Coast Monumental Company; Theodore Hedlund, doing business as Atlas Paint Company; F. H. Madsen and Gustaf Jonason, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcelino, M. Swanson, William Griswold, O. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whit-

ford, F. A. Fetterly, Thomas S. Short, George W. Hicks and Robert M. Davis and Frank C. Neal, co-partners doing business under the firm name and style of Davis & Neal; Sherman Wells, Carl J. Gerring, George Gerring, F. R. Shoen, Adolph W. Aufang, C. H. Boedecker, William L. Owens, F. H. Godfrey, W. E. Morris, Frederick Webber, and Samuel Rothstein have, or claim to have, some interest in, or lien upon the said mortgaged premises or some part thereof; but cross-complainants aver that the interest of each of said defendants, if any, is inferior, subject and subsequent to the lien of the cross-complainants by virtue of the premises as above set forth.

And the said Scandinavian-American Bank of Tacoma and James P. Duke as Supervisor of Banks of the State of Washington, as a third cross-bill of complaint against the plaintiff herein, and against the defendants, F. P. Haskell as receiver of the Scandinavian-American Building Company, a corporation; Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased; R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant, and Ann Davis, co-partners doing business under the name and style of Tacoma Millwork Supply Company; G. Wallace Simpson; Savage-Scofield Company, a corporation; Puget Sound Iron & Steel Works, a corporation; E. E. Davis & Company, a corporation; St. Paul & Tacoma Lumber Company, a corporation; Far West Clay Company, a corporation; Henry Mohr Hardware Company, Inc., a corporation; Hunt &

Mottet Company, a corporation; Edward Miller Cornice & Roofing Company, a corporation; Washington Brick, Lime & Sewer Company, a corporation; Otis Elevator Company, a corporation; U. S. Machine & Engineering Company, a corporation; Colby Star Manufacturing Company, a corporation; Tacoma Shipbuilding Company, a corporation; Crane Company, a corporation; Ben Olson Company, a corporation; H. C. Greene, doing business as H. C. Greene Iron Works; Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company; S. O. Matthews and Frank L. Jones, copartners doing business under the firm name and style of City Lumber Agency; J. D. Mullins, doing business as J. D. Mullins Bros.; S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company; M. Kleiner, doing business as Liberty Lumber & Fuel Company; J. A. Soderberg, doing business as West Coast Monumental Company; Theodore Hedlund, doing business as Atlas Paint Company; F. H. Madsen and Gustaf Jonason, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, O. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A.

Fetterly, Thomas S. Short, George W. Hicks, Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal; Sherman Wells, Carl J. Gerring, George Gerring, F. R. Schoen, Adolph W. Aufang, C. H. Boedecker, William L. Owens, Frederick Webber, F. H. Godfrey, W. E. Morris, and Samuel Rothstein aver:

I.

These cross-complainants reallege the allegations contained in paragraphs I to XIII, inclusive, as set forth in the first bill of complaint hereinabove, and makes the same part of this, the third cross-bill of complaint herein, as fully and to all intents and purposes as though the same were set forth herein verbatim.

II.

That pursuant to the said agreement attached hereto and marked Exhibit "X" the said Scandinavian-American Building Company obtained from the Metropolitan Life Insurance Company of New York an agreement to lend \$600,000.00 upon said building when same should have been completed, and that one G. Wallace Simpson of Philadelphia, represented to said Scandinavian-American Building Company that he could and would pledge such mortgage as security and thus obtain such sums of money as were necessary up to \$600,000.00 as the work on said building progressed if said mortgage were executed to him, such sums so obtained as advances to be repaid to the lenders thereof out of the money obtained from said Metropolitan Life

Insurance Company, when said building was completed.

III.

That in accordance with the said agreement and on the 10th day of March, 1920, the said Scandinavian-American Building Company, in the due exercise of the powers and authority in [65] that behalf by it possessed, due corporate action having first been had for that purpose, made, executed and delivered to said G. Wallace Simpson its promissory note, in writing, in the principal sum of \$600,000.00 bearing interest at the rate of 6% per annum until maturity, interest payable semi-annually on the 1st days of May and November of each year, and the principal payable at the rate of \$10,000.00 on November 1, 1921, \$10,000.00 on May 1, 1922, and \$10,000.00 on the first days of November and May thereafter until the 1st day of November, 1935, when the balance of the said principal, with interest, amounting to \$320,000.00, should become due and payable.

IV.

That on said March 10th, 1920, the said Scandinavian-American Building Company, in the due exercise of the powers and authority by it in that behalf possessed, corporate action having first been had, in order to secure the payment of the principal and interest of the said note, and to secure the performance and observance of all the covenants contained in the mortgage hereinafter mentioned, and in accordance with the agreements made with the said Scandinavian-American Bank of Tacoma, hereinabove referred to, made, executed and delivered to

the said G. Wallace Simpson a mortgage wherein it mortgaged to the said Simpson the said property described in said agreement, viz., Lots 10, 11 and 12, in block 1003, as the same are known and designated upon that certain plat entitled, "Map of New Tacoma, W. T.," which was filed for record in the office of the Auditor of Pierce County, Washington, on February 3, 1875.

V.

That a true copy of the said mortgage to the said Simpson is attached to this cross-bill of complaint and marked Exhibit "Y" and the cross-complainants pray leave that said copy marked Exhibit "Y" may be taken in all respects as if it were fully and completely set forth in the body of this cross-bill of complaint.

VI.

That the said mortgage was duly filed for record in the office of the Auditor of Pierce County, Washington, on March 10th, 1920, at 4:57 P. M., and was recorded in book 225 of Records of Mortgages, Pierce County, on page 320.

VII.

That pursuant to the said contracts hereinabove mentioned the said Scandinavian-American Building Company began the erection of a sixteen-story building upon the lots therein described, and for such purposes contracted with certain laborers and materialmen, some of whom are the defendants herein, for materials and labor to be used in the construction of the said building, all of which by their terms provide that said laborers and material-

men should have no liens against the real property described in said contract, Exhibit "X."

VIII.

That on or about the 25th day of June, 1920, the said G. Wallace Simpson, having failed to obtain advances upon the security of said mortgage, and the said Scandinavian-American Building Company being in need thereof, and said Scandinavian-American Bank of Tacoma advanced to the said Scandinavian-American Building Company the sum of \$432,822.99 at various times between the said 25th day of June, 1920, and the 15th day of January, 1921, and the said Scandinavian-American Building Company caused the said G. Wallace Simpson to resign to the said Scandinavian-American Bank of Tacoma the said mortgage hereinabove referred to and marked Exhibit "Y" attached hereto; that in making of the advances herein referred to the said Scandinavian-American Bank of Tacoma fulfilled the agreement of the said G. Wallace Simpson to the extent of the said \$432,822.99.

IX.

That the said mortgage attached hereto and marked Exhibit "Y" was conditioned, among other things, upon the payment of the interest of the said note when due, according to the terms and conditions of the said note; and that it is provided, among other things, that if default should be made in the principal of the said note thereby secured, or of the interest thereon when same became payable, then the principal sum, with all arrearages of interest thereon, and attorney's fees, should, at the option of

the mortgagee, become due and payable thereafter; and that the said Scandinavian-American Building Company has failed to pay the interest upon the said promissory note according to the terms thereof; and that there is now due and owing from the said Scandinavian-American Building Company to the said Scandinavian-American Bank of Tacoma and to the cross-complainant, J. P. Duke, as such Supervisor of Banks, the following sums with interest at six per cent per annum thereon until paid, as follows, to wit:

June 25, 1920	\$200,000.00
Dec. 31, 1920	209,133.25
Jan. 15, 1921	32,822.99
<hr/>	
Total	\$441,956.34

[66]

X.

That by filing this cross-bill of complaint, these cross-complainants exercise their option of declaring the aforesaid principal sum and all arrearages of interest thereon and attorney's fees to be immediately payable as in said mortgage provided.

XI.

That in said note and mortgage it is expressly agreed that in case any action or proceeding is brought upon said note or to foreclose said mortgage, the holder thereof shall be entitled to such attorney's fees as the Court shall deem reasonable, and cross-complainants aver that the sum of \$40,000.00 is a reasonable attorney's fee in this matter.

XII.

That no proceeding has been had at law or otherwise, and that no other action has been brought for the recovery of the said sum or any part thereof.

XIII.

The cross-complainants further show upon information and belief that the plaintiff, McClintic-Marshall Company, a corporation, and the defendants, F. P. Haskell as receiver of the Scandinavian-American Building Company, a corporation; Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased; R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company; G. Wallace Simpson; Savage-Scofield Company, a corporation; Puget Sound Iron & Steel Works, a corporation; E. E. Davis & Company, a corporation; St. Paul & Tacoma Lumber Company, a corporation; Far West Clay Company, a corporation; Henry Mohr Hardware Company, Inc., a corporation; Hunt & Mottet Company, a corporation; Edward Miller Cornice & Roofing Company, a corporation; Washington Brick, Lime & Sewer Company, a corporation; Otis Elevator Company, a corporation; U. S. Machine & Engineering Company, a corporation; Colby Star Manufacturing Company, a corporation; Tacoma Shipbuilding Company, a corporation; Crane Company, a corporation; Ben Olson Company, a corporation; H. C. Greene, doing business as H. C. Greene

Iron Works; Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company; S. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency; J. D. Mullins, doing business as J. D. Mullins Bros.; S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company; M. Kleiner, doing business as Liberty Lumber & Fuel Company; J. A. Soderberg, doing business as West Coast Monumental Company; Theodore Hedlund, doing business as Atlas Paint Company; F. H. Madsen and Gustaf Jonason, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, O. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, George W. Hicks, Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal; Sherman Wells, Carl J. Gerring, George Gerring, F. R. Schoen, Adolph W. Aufang, C. H. Boedecker, William L. Owens, Frederick Webber, F. H. Godfrey, W. E. Morris and Samuel Rothstein have, or claim to have, some interest in or lien upon the said mortgaged premises or some part thereof; but cross-

complainants aver that the interest of each of said defendants, if any, is inferior, subject and subsequent to the lien of the cross-complainants by virtue of the premises, as above set forth.

WHEREFORE these cross-complainants pray:

(1) That said mortgage, Exhibit "W," be foreclosed;

(2) That the lien of said mortgage, Exhibit "W," may be decreed and established as a lien upon all and particular, the premises and property covered thereby, prior to any and all other liens and claims; and that a fair and just account may be had touching the amount due to cross-complainants upon the mortgage aforesaid.

(3) That in default of the payment of the sum so found to be due within a time to be limited by a decree of this Honorable Court, together with such sum as may be sufficient to pay all expenses of having abstracts of title and tax histories certified to date, together with interest thereon, and together with such sum as may be allowed by this Honorable Court to the plaintiff for attorney's compensation and for costs, and it may be decreed that the defendants, and all persons claiming from, through or under them, or any of them, may be absolutely and forever barred and foreclosed of and from all right, title, interest or equity of redemption of, in and to the said mortgaged premises and property, or any part thereof, and that a sale of the said mortgaged premises and property, free and clear of all other liens and claims whatsoever, be ordered in accordance with the laws and the practice

of this Honorable Court; and that [67] the proceeds may be applied to the expenses of this proceeding and attorney's compensation, and to the amount found due the plaintiff herein, and the balance, if any, may be applied as this Honorable Court may direct.

(4) That the contract, Exhibit "X," made by the defendant Scandinavian-American Building Company with the Scandinavian-American Bank of Tacoma be established by a decree of this Honorable Court as an equitable purchase money mortgage upon the premises therein described and covered thereby to the extent of \$350,000.00 with interest thereon from June 10th, 1920, at the rate of 6% per annum until paid, that same be foreclosed and that the lien of said mortgage, Exhibit "X," may be decreed and established as a lien upon all and singular the premises and the property of the defendant Scandinavian-American Building Company covered thereby, prior to any and all other liens and claims except the mortgages hereinabove referred to; and that a fair and just account may be had fixing the amount due the said cross-complainants upon the mortgage aforesaid, and that in default of the payment of the amount so found to be due within a time to be limited by a decree of this Honorable Court it may be decreed that the defendants, and all persons claiming any interest in or to the said mortgaged premises, or any part thereof, from, through or under them, or any of them, may be absolutely and forever barred and foreclosed of any and all right, title and interest or equity of

redemption of, in and to said mortgaged premises and property, or any part thereof, and that a sale of said mortgaged premises and property, free and clear of all liens and claims whatsoever, except the mortgages hereinabove referred to, be ordered in accordance with law and the practice of this Honorable Court, and that the proceeds may be applied to the expenses of said sale, and to the payment of the amount found due as aforesaid upon the principal and interest due to cross-complainants, as aforesaid, and the balance, if any, as this Honorable Court may direct.

(5) That the said mortgage, Exhibit "Y," made by the defendant Scandinavian-American Building Company, be foreclosed, that the lien of said mortgage, Exhibit "Y," may be decreed and established as a lien upon all and singular the premises and property of the defendant Scandinavian-American Building Company covered thereby, prior to any and all other liens and claims, except the first mortgage, Exhibit "W," hereinabove referred to, and that a fair and just account may be had touching the amount due the cross-complainants upon the said note and mortgage aforesaid; that in default of the payment of the amount so found to be due within a time to be limited by a decree of this Honorable Court, together with interest thereon, and together with such sums as may be allowed by this Honorable Court to the cross-complainants for attorney's compensation, it may be decreed that the defendants and all persons claiming any interest in or to the said mortgaged property, or any part

thereof, from, through or under them or either or any of them, as aforesaid, subject to the liens of the said mortgage hereinabove referred to as Exhibit "W" as aforesaid may be absolutely and forever barred and foreclosed of and from all right, title, and interest or equity of redemption of, in and to said mortgaged premises and property, or any part thereof, and that a sale of the whole of said mortgaged property, subject to the liens of the mortgage hereinabove referred to as Exhibit "W," but free and clear of all other claims and liens whatsoever, be ordered in accordance with law and the practice of this Honorable Court; and that the proceeds may be applied to the expenses of this proceeding and to attorney's compensation, and to the payment of the amount found due as aforesaid upon the principal and interest of the note secured by the mortgage, Exhibit "Y," and the balance, if any, as this Honorable Court may direct.

(6) That the defendants herein and the plaintiff, McClintic-Marshall Company, may answer all and singular the premises, but not under oath (answer under oath being hereby expressly waived).

(7) That cross-complainants may have such other and further relief in the premises as the nature and circumstances of the case require and as your Honor may seem fit.

May it please your Honor to grant to your cross-complainant writs of subpoena, to be directed to the plaintiff, McClintic-Marshall Company, a corporation, and to the defendants, Ann Davis and R. T.

Davis, Jr., as executors of the estate of R. T. Davis, deceased; R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company; G. Wallace Simpson; Savage-Scotfield Company, a corporation; Puget Sound Iron & Steel Works, a corporation; E. E. Davis & Co., Inc., a corporation; St. Paul & Tacoma Lumber Company, a corporation; Far West Clay Company, a corporation; Henry Mohr Hardware Co., Inc., a corporation; Hunt & Mottet Company, a corporation; Edward Miller Cornice & Roofing Company, a corporation; Washington Brick, Lime & Sewer Company, a corporation; Otis Elevator Company, a corporation; U. S. Machine & Engineering Co., Inc., a corporation; Colby Star Manufacturing Company, a corporation; Tacoma Shipbuilding Company, a corporation; Crane Company, a corporation; Ben Olson Company, a corporation; H. C. Greene, doing business as H. C. Greene Iron Works; Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company; S. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency; J. D. Mullins, doing business as J. D. Mullins Brothers; S. J. Pritchard and C. H. Graves, copartners doing [68] business as P. & G. Lumber Company; M. Kleiner, doing business as Liberty

Lumber & Fuel Company; J. A. Soderberg, doing business as West Coast Monumental Company; Theodore Hedlund, doing business as Atlas Paint Company; F. H. Madsen and Gustaf Jonason, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, O. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, George W. Hicks; Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis and Neal; Sherman Wells, Carl J. Gerring, George Gerring, F. R. Schoen, Adolph W. Aufang, C. H. Boedecker, William L. Owens, F. H. Godfrey, W. E. Morris, Samuel Rothstein, and Frederick Webber, therein and thereby commanding them and each of them at a certain time and under a certain penalty therein to be named to be and appear before your Honor in this Honorable Court; then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being expressly waived, and to stand to and abide and perform such

other and further orders or decrees as to your Honor shall seem meet.

J. D. DUKE,
Supervisor of Banks of the State of Washington.

F. D. OAKLEY,
401 Perkins Building, Tacoma, Wash-
ton.

GUY E. KELLY,
THOMAS MacMAHON,
1005 Rust Building, Tacoma, Washington.
Solicitor for Cross-complainant.

United States of America,
Western District of Washington,
Southern Division,
County of Thurston,—ss.

J. P. Duke, being first duly sworn, on oath deposes and says, that he is the cross-complainant above named and the Supervisor of Banks of the State of Washington; that he has read the above and foregoing cross-bill of complaint, knows the contents thereof, and believes the same to be true.

J. P. DUKE.

Subscribed and sworn to before me this 14th day of June, 1921.

[Seal] FRED G. COOK,
Notary Public for Washington, Residing at Olym-
pia. [69]

Exhibit "W."

MORTGAGE.

THIS INDENTURE, made this 2nd day of Sep-
tember, A. D. 1910, between J. E. CHILBERG and

ANNA M. CHILBERG, husband and wife at all times since previous to acquiring title to the within described property, jointly and severally, hereinafter referred to as the "first party," and THE PENN MUTUAL LIFE INSURANCE COMPANY, a corporation, organized under the laws of the State of Pennsylvania, and having its principal place of business at Philadelphia, hereinafter referred to as the "second party":

WITNESSETH, that the first party in consideration of ONE HUNDRED THOUSAND (\$100,000.00) DOLLARS, to first party in hand paid by second party, the receipt of which is hereby acknowledged, does by these presents grant, sell, convey and warrant unto second party, its successors and assigns, the following described property, situated in Pierce County, Washington, to wit:

Lots numbered eleven (11) and twelve (12) in Block numbered ten hundred and three (1003) in the City of Tacoma as shown and designated on a certain plat entitled "Map of New Tacoma, Washington Territory," which plat was filed for record in the office of the Auditor of said Pierce County February 3rd, 1875;

Also including herein the party walls on each or either side of said premises, and the agreements respecting the same, and all rights in or to said party walls or under or by virtue of all of the agreements respecting the same;

Any streets or alleys, or portions thereof, on which the above property abuts which have

been or may hereafter be vacated by City Council or otherwise and be annexed to the above described property, or become the property of the mortgagors, their heirs, executors, successors and assigns, shall immediately become additional security under this mortgage and subject to all the terms and conditions in said mortgage;

together with all the buildings and structures thereon or that may hereafter be placed thereon, and also any and all elevators, engines, boilers, and all heating, lighting, plumbing and ventilating fixtures and apparatus now on said premises, or that may hereafter be placed thereon, with all and singular the tenements, hereditaments, and appurtenances to the same belonging or in anywise appertaining, hereby expressly waiving and relinquishing any and all right or claim of homestead, and the benefit of any and all exemption, appraisal or stay laws of the State of Washington.

TO HAVE AND TO HOLD the above granted premises unto second party, its successors and assigns, forever, with all the tenements, hereditaments and appurtenances thereto belonging.

First party hereby covenants and agrees to and with second party as follows, to wit:

1. That first party is seized of said premises in fee simple absolute, and has good right to convey and mortgage the same.
2. That second party shall quietly enjoy said premises.

3. That said premises are free from all encumbrances.

4. That first party will execute or procure and deliver to second party upon demand any and all further conveyances or other instruments necessary or proper to render this mortgage a first lien upon a good and marketable title to said property.

5. That first party will warrant and defend the title to said property forever against all lawful claims and demands whatsoever.

THIS INSTRUMENT IS A MORTGAGE given to secure the payment of the following sums and the performance of the following agreements, to wit:

1. The first party is justly indebted to the second party in the principal sum of \$100,000.00 evidenced by a certain negotiable promissory note of even date herewith, made by first party and payable to the order of second party, payable on the 1st day of September, A. D. 1915, with interest thereon from date until maturity at the rate of 5 per cent per annum, and from maturity until paid at the rate of twelve per cent per annum, payable semi-annually on [70] the 1st days of March and September in each year, both principal and interest payable only in United States gold coin of the present standard of weight and fineness, at the office of PENN MUTUAL LIFE INSURANCE COMPANY, Philadelphia, Pennsylvania, with New York exchange. All as shown in said note and in the interest coupons thereto attached; which said principal and interest first party hereby promises

and agrees to pay, and first party hereby consents to the entry of a deficiency judgment against first party jointly and severally for whatever balance of the judgment debt, costs, expenses, or attorney fees that may remain unsatisfied after the foreclosure sale, if any be made, hereunder.

First party hereby agrees to at once procure and maintain at least \$80,000.00 fire insurance on the buildings now or hereafter erected upon said property, in some responsible insurance company to be approved by second party, with loss, if any, in said insurance and in all insurance now or hereafter carried by first party on said property, payable to second party, its successors or assigns, as its interest may appear, and first agrees to pay all premiums therefor when due, and to forthwith deliver to second party all policies for all insurance now or hereafter carried on said property to be held by second party until date of expiration, whether before or after foreclosure, with the right, but under no obligation, to collect by suit or otherwise, and at first party's expense, any and all money that may at any time become payable thereon, and to apply the same when received to the payment of any part of the indebtedness secured by this mortgage, together with all the costs and expenses incurred in collecting same, including attorney fees, or second party may elect to have the buildings repaired or new buildings erected on said mortgaged premises. If first party shall for any reason fail to procure such insurance, or any part thereof, then second party shall have the right, but shall be under no

obligation to procure the same, or any part thereof, and to pay the premiums therefor, and first party agrees to repay same to second party on demand.

First party agrees to keep all the property above described or referred to in as good repair and condition as same is now in, or may be put in during the continuance of this mortgage, and not to commit or permit waste of said premises until the debt hereby secured is fully paid.

First party hereby agrees to pay all taxes, assessments, and other public charges that have been or may hereafter be levied or assessed upon said premises, or upon said mortgage or the note hereby secured, or against the holder on account thereof, and all personal taxes of first party, before same become delinquent, and to deliver to second party satisfactory receipts showing payment thereof, and also agrees to pay or discharge delinquent any and all liens, or claims of any nature now existing or that may hereafter be created or perfected on or against said property mortgaged hereby, so that this mortgage shall be and continue a first lien on all said property above described until all sums hereby secured are fully paid. If first party shall fail to perform any of the foregoing agreements, then second party shall have the right, but shall be under no obligation, to pay, contest, or extinguish such taxes, assessments, insurance premiums, liens, claims, adverse titles, or encumbrances, or cause said repair to be made, and the amount so paid including all necessary expenses and attorney fees, with interest thereon at the rate of twelve per cent

per annum from the date of any advancement until the same is wholly repaid, shall be a lien upon the premises aforesaid and be secured by this mortgage and collected in the same manner and as a part of the debt secured hereby, and said first party expressly agrees to pay the same on demand.

The first party shall not, and will not apply for or claim any deduction by reason of this mortgage from the taxable value of said land, premises or property, but will pay all taxes upon the same in full, and also all taxes which may be levied upon this mortgage or the moneys secured hereby, without regard to any law heretofore enacted or hereafter to be enacted assessing the whole or any part thereof to the party of the second part. Upon violation of this condition or the passage by the state of a law imposing upon the mortgagee payment of the whole or any portion of the taxes on the mortgaged premises or upon the moneys or loan secured by this mortgage, or upon the rendering by any court of competent jurisdiction of a decision that the assumption by the mortgagor of liability to pay any tax or taxes assessed against the mortgagee is legally inoperative, then and in any such event the debt hereby secured may, at the option of the party of the second part, immediately become due and collectible, as though the debt had matured through lapse of time, and without any deduction, anything herein contained or any law which has passed to the contrary notwithstanding.

First party hereby agrees that in case of any failure to pay any part of the sums hereby secured,

either principal or interest, taxes, liens, encumbrances, repairs, insurance premiums, or other items herein referred to, according to the terms of said note and interest notes, or of this mortgage, when the same become due or payable, or in case of any failure to comply with any of the conditions or agreements contained in this mortgage, the whole sum secured hereby shall at the option of second party, become at once due and payable, without any notice or demand, with interest from date of default until paid at the rate of twelve per cent per annum, it being agreed that time and the strict performance of the provisions hereof and of said note and interest notes are material and of the essence of the same, and said mortgage may be foreclosed, whereupon, in addition to the sum found due at the time of foreclosure, first party hereby agrees to pay the second party as attorney fees in said suit the sum provided therefor in said [71] note, and also the expense of having the abstract of title to said premises brought down to date to show the commencement of said foreclosure proceedings, together with the costs and disbursements of such suit.

It is further agreed that in case of any default in any respect so that this mortgage may be foreclosed, all the rents, revenues and profits of said premises during the existence of this mortgage and until the payment of the debt secured hereby and until the expiration of the time for redemption after foreclosure sale, or execution, are hereby mortgaged and pledged to the payment of the indebtedness secured hereby, and that upon any default on the

part of said first party in the performance of any of the terms, conditions or provisions of this mortgage, said note, or said interest notes, it is agreed and shall be conclusively presumed that said rents, revenues and profits are in danger of being lost, removed and materially injured, and that said premises are insufficient to discharge the debt secured hereby; that upon the filing of the complaint to foreclose this mortgage, the court, on motion of second party, and without any notice to first party, shall appoint a receiver with the usual powers, to take immediate possession of all of the property mortgaged hereby, and to demand, receive and recover all rents, revenues and profits of said property then due or payable or that may thereafter become due or payable; that said receivership shall, at the option of the second party, continue until payment of the whole sum secured hereby, or until the expiration of the time of redemption after the foreclosure sale hereunder. That said receiver shall, on motion of second party, under the order and direction of the Court, pay any or all taxes, or other liens, insurance, and repairs on said property, out of the money so received by him, and shall pay the balance, after the expenses of said receivership have been paid, to the plaintiff in the action to apply on said mortgage indebtedness. It is agreed that said party of the second part shall be under no liability of any nature because of or arising out of the appointment of such receiver, or any of his acts or doings.

All of the provisions and agreements herein contained shall be binding on the party or parties of the first part, jointly and severally, as principals, and their respective heirs, executors, administrators, successors and assigns, as fully and to the same effect as if expressly named herein, and all rights created or evidenced hereby or by said note, or said interest notes, shall inure to the benefit of the heirs, executors, administrators, successors and assigns and said second party, as fully as if expressly named herein, and may be exercised by them.

PROVIDED, HOWEVER, that if all the foregoing covenants, agreements and stipulations shall be fully performed according to the true intent hereof, this mortgage shall thenceforth be null and void, and shall be released by second party at the cost of first party.

IN WITNESS WHEREOF, first parties have subscribed their names hereto, jointly and severally, as principals.

(Signed) J. E. CHILBERG.

(Signed) ANNA M. CHILBERG.

Executed in the presence of

E. L. SHANSTROM (Signed).

State of Washington,
County of King,—ss.

I, Percy C. Shanstrom, a Notary Public in and for the State of Washington, residing at Seattle in said County, do hereby certify that on this 20th day of September, A. D. 1910, personally appeared before me J. E. Chilberg and Anna Chilberg, husband and wife, both of whom stated to me under oath that

they were husband and wife at time of acquiring title to the within described property and have so remained at all times since, to me known to be the individuals described in and who executed the within instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 20th day of September, A. D. 1910.

[Notary Seal]

(Signed) PERCY C. SHANSTROM,
Notary Public in and for the State of Washington,
Residing at Seattle in said State. [72]

No. 324812

MORTGAGE

J. E. CHILBERG & WIFE

TO

THE PENN MUTUAL LIFE INSURANCE
COMPANY

State of Washington,

County of Pierce,—ss.

Office of County Auditor

I hereby certify that the within Mortgage was received for record in this office on the ——Sep. 23, 1910 — day of —— A. D. 1910 —— at 3:46 o'clock P. M., and recorded at the request of Calvin Philips

& Company, in Book 165 of Mortgages, on page 452.

W. A. STEWART,
County Auditor.

(Signed) HARRY AUSTIN,
Deputy County Auditor.

Negotiated by

CALVIN PHILIPS & CO.,

Tacoma Office: 211-12-13 California Building.

Seattle Office: 322 Bailey Building. [73]

Exhibit "X."

CERTIFICATE AND AGREEMENT

THIS INDENTURE made this 20th day of February, 1920,

WITNESSETH:

That WHEREAS pursuant to resolution of SCANDINAVIAN-AMERICAN BANK OF TACOMA, adopted at a meeting of the Board of Directors of said SCANDINAVIAN-AMERICAN BANK OF TACOMA on the 10th day of February, 1920, a copy of said resolution being attached hereto and marked Exhibit "A" and by this reference made a part hereof as though set forth in full herein, the SCANDINAVIAN-AMERICAN BUILDING COMPANY agreed to execute to SCANDINAVIAN-AMERICAN BANK OF TACOMA a certificate or agreement to deliver said SCANDINAVIAN-AMERICAN BANK OF TACOMA bonds of the par value of \$350,000, bearing interest at 6

per cent per annum, payable semi-annually and secured by a second mortgage upon

Lots 10, 11 and 12, in Block 1003, "Map of New Tacoma, W. T.," situated in Pierce County, Washington,
the total issue of said second mortgage bonds not to exceed the sum of \$750,000, and

WHEREAS pursuant to said resolution said SCANDINAVIAN-AMERICAN BANK OF TACOMA has executed and delivered to SCANDINAVIAN-AMERICAN BUILDING COMPANY this day a warranty deed of conveyance to said lots 11 and 12, described in said resolution.

NOW, THEREFORE, and for and in consideration of the execution of said deed the undersigned, SCANDINAVIAN-AMERICAN BUILDING COMPANY, does hereby agree to execute and deliver to SCANDINAVIAN-AMERICAN BANK OF TACOMA, within a period of four (4) months from the 10th day of February, 1920, mortgage bonds of the face or par value of \$350,000, being a part of a total issue of \$750,000; said bonds to bear interest at 6 per cent per annum, payable semi-annually and to contain a tax-free covenant with respect to the income thereon as is provided in said resolution and to be secured by a second mortgage upon

Lots 10, 11 and 12, in block 1003, "Map of New Tacoma, W. T.," situated in Pierce County, Washington,
and upon the delivery of said bonds, this certificate to be returned to the undersigned.

IN WITNESS WHEREOF this certificate is executed by said SCANDINAVIAN-AMERICAN BUILDING COMPANY, by its President and Secretary thereunto duly authorized this 20th day of February, 1920.

SCANDINAVIAN-AMERICAN BUILD-
ING COMPANY.

By (Signed) CHARLES DRURY,
President.

By (Signed) J. V. SHELDON,
Secretary. [74]

EXHIBIT "A" ATTACHED TO EXHIBIT "X."

WHEREAS the SCANDINAVIAN-AMERICAN BANK OF TACOMA is the owner of lots 11 and 12 in block 1003, in "Map of New Tacoma, W. T.," situated in Pierce County, Washington, which property is at the present time encumbered by a mortgage in the principal sum of \$70,000, and

WHEREAS SCANDINAVIAN-AMERICAN BUILDING COMPANY, a corporation, organized under the laws of the State of Washington, has proposed to purchase said property for the consideration of \$350,000 and proposes to erect upon said premises and lot 10 adjoining, a modern office building of approximately sixteen stories in height and to provide the ground floor thereof with space and accommodations for a metropolitan banking institution, which space shall be reserved for the use of this bank upon a rental to be agreed upon, and

WHEREAS for the purpose of financing the construction and erection of said building, the follow-

ing arrangement has been entered into by said SCANDINAVIAN-AMERICAN BUILDING COMPANY, to wit:

A first mortgage for the principal sum of \$600,000 to be executed by said SCANDINAVIAN-AMERICAN BUILDING COMPANY upon all three lots, which said mortgage must be executed and recorded before actual construction shall begin and before any contract for such construction shall have been let and a series of second mortgage bonds of the total par value of \$750,000 to be executed and secured by a second mortgage on said premises, which said bonds shall run for a period of fifteen (15) years and bear interest at 6 per cent per annum, payable semi-annually, and contain a covenant exempting the income thereof equal to 2 per cent of the total par value of said bonds exempt from taxation by the Federal Income Tax Laws, and

WHEREAS said SCANDINAVIAN-AMERICAN BUILDING COMPANY cannot execute said first mortgage or said second mortgage and the bonds to be secured thereby until it shall first have acquired title to said premises; and

WHEREAS said SCANDINAVIAN-AMERICAN BUILDING COMPANY has agreed to execute and deliver to SCANDINAVIAN-AMERICAN BANK OF TACOMA second mortgage bonds hereinbefore referred to of the par value of \$350,000 in payment for said real estate as soon as the same can expediently be prepared and be a second mortgage lien upon said premises; and

WHEREAS temporarily, said SCANDINAVIAN-AMERICAN BUILDING COMPANY will execute a certificate or agreement agreeing to so deliver said bonds as soon as the same can be executed as above provided.

NOW, THEREFORE, BE IT RESOLVED that the President and Cashier of SCANDINAVIAN-AMERICAN BANK OF TACOMA be and they hereby are authorized, directed and empowered to execute and deliver to said SCANDINAVIAN-AMERICAN BUILDING COMPANY a warranty deed of conveyance to said lots 11 and 12, in block 1003, "Map of New Tacoma, W. T.," upon receiving from said SCANDINAVIAN-AMERICAN BUILDING COMPANY a certificate or agreement agreeing

To deliver to said SCANDINAVIAN-AMERICAN BANK OF TACOMA, within four (4) months from the date hereof, bonds of the par value of \$350,000, bearing interest at 6 per cent per annum, payable semi-annually and running for a period of fifteen (15) years, which said bonds shall be secured by a second mortgage on the premises known and described as

Lots 10, 11 and 12, in block 1003, "Map of New Tacoma, W. T.,"

it being expressly understood and agreed that the total part value of all of said second mortgage bonds shall not exceed the sum of \$750,000.

The Directors next discussed the advisability of holding meetings of the board at regular intervals and it was moved, seconded and carried that regular

meetings of the Board shall hereafter be held on the second and fourth Wednesday in each month.

There being no further business, the meeting, on motion, adjourned.

Attest: _____ [75]

Exhibit "Y."

SCANDINAVIAN-AMERICAN BUILDING COMPANY, a corporation organized under the laws of the State of Washington, with its principal place of business at Tacoma, Washington (hereinafter called the Mortgagor), mortgages to G. WALLACE SIMPSON, of Philadelphia, Pennsylvania (hereinafter called the Mortgagee), the following described real estate situated in Pierce County, State of Washington, particularly described as follows:

All of lots Ten (10), Eleven (11), and Twelve (12), in Block One Thousand Three (1003), as the same are known and designated upon that certain plat entitled "Map of New Tacoma, Washington Territory," which was filed for record in the office of the Auditor of Pierce County, Washington, on February 3, 1875, said property being otherwise described as follows:

Beginning at a point where the northerly marginal line of South Eleventh Street in the city of Tacoma intersects the easterly marginal line of Pacific Avenue; thence northerly along said easterly marginal line of Pacific Avenue a distance of 74.941 feet to the intersection of said easterly marginal line with the northerly marginal line of said Lot

Ten (10); thence easterly along said northerly marginal line of said Lot Ten (10) a distance of 119.893 feet to a point where said northerly line of Lot Ten intersects the westerly marginal line of Court "A" (said Court "A" being the alley between the aforesaid Block 1003 and Block 1002 in said addition); thence southerly along said westerly marginal line of said Court "A" a distance of 74.941 feet to a point where said westerly marginal line of Court "A" intersects the northerly marginal line of South Eleventh Street; thence westerly along said northerly marginal line of South Eleventh Street a distance of 119.890 feet to the point of beginning;

TOGETHER with all the buildings now erected or that may hereafter be erected thereon.

TOGETHER with all and singular the privileges, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining; to secure the payment in United States Gold Coin of the present standard of weight and fineness of the principal sum of Six Hundred Thousand Dollars (\$600,000.00) according to the terms and conditions of one certain promissory note executed by the mortgagor to the mortgagee, of even date herewith, which said note is in words and figures as follows:

\$600,000.00

March 10th, 1920.

For value received, without grace, I promise to pay to the order of G. Wallace Simpson, of Philadelphia, Pennsylvania, the principal sum of Six Hundred Thousand Dollars (\$600,000.00), with interest thereon from date hereof at the rate of six

per cent (6%) per annum, until maturity, payable semi-annually on the first days of May and November of each and every year. Said principal sum shall be paid as follows:

Ten Thousand Dollars on November 1, 1921;
Ten Thousand Dollars on May 1, 1922;
Ten Thousand Dollars on November 1, 1922;
Ten Thousand Dollars on May 1, 1923;
Ten Thousand Dollars on November 1, 1923;
Ten Thousand Dollars on May 1, 1924;
Ten Thousand Dollars on November 1, 1924;
Ten Thousand Dollars on May 1, 1925;
Ten Thousand Dollars on November 1, 1925;
Ten Thousand Dollars on May 1, 1926;
Ten Thousand Dollars on November 1, 1926;
Ten Thousand Dollars on May 1, 1927;
Ten Thousand Dollars on November 1, 1927;
Ten Thousand Dollars on May 1, 1928;
Ten Thousand Dollars on November 1, 1928;
Ten Thousand Dollars on May 1, 1929;
Ten Thousand Dollars on November 1, 1929;
Ten Thousand Dollars on May 1, 1930;
Ten Thousand Dollars on November 1, 1930;
Ten Thousand Dollars on May 1, 1931;
Ten Thousand Dollars on November 1, 1931;
Ten Thousand Dollars on May 1, 1932;
Ten Thousand Dollars on November 1, 1932;
Ten Thousand Dollars on May 1, 1933;
Ten Thousand Dollars on November 1, 1933;
Ten Thousand Dollars on May 1, 1924;
Ten Thousand Dollars on November 1, 1924;
Ten Thousand Dollars on May 1, 1935; [76]

and the balance of said principal sum, to wit, three hundred twenty thousand dollars (\$320,000) on November 1, 1935. Said principal sum shall bear interest from maturity until paid at the rate of twelve per cent per annum. Said principal sum and interest shall be paid in United States Gold Coin of the present standard of weight and fineness, at the office of Metropolitan Life Insurance Company in New York, N. Y.

This note with interest is secured by a first mortgage of even date herewith, executed and delivered by the maker hereof to said G. Wallace Simpson, conveying certain real estate described therein, in Pierce County, State of Washington, the terms whereof are made a part hereof.

It is hereby agreed that if default be made in the payment of this note or any part thereof, or any interest thereon, or if failure be made to perform any of the covenants or agreements contained in said mortgage securing this note, then, at the option of the holder of the same, the principal sum, with accrued interest, shall at once become due and collectible, without notice, time being of the essence of this contract, and said principal sum shall bear interest from such default until paid at the rate of twelve per cent per annum.

In case suit is instituted to collect this note or any portion thereof, I promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in such suit. I consent to a personal deficiency judgment on the above debt, with the intent

that the same may be paid in full, irrespective of the security given therefor.

This contract is to be construed in all respects and enforced according to the laws of the State of Washington.

SCANDINAVIAN-AMERICAN BUILD-
ING COMPANY,

By CHARLES DRURY,
Its President.

And by J. V. SHELDON,
Its Secretary.

AND THE MORTGAGOR hereby covenants and agrees with the mortgagee as follows:

FIRST. The mortgagor is lawfully seized of the premises aforesaid and the same are free and clear of all encumbrances of every nature and kind whatsoever, and the mortgagor will forever warrant and defend the same, with the appurtenances, unto the said mortgagee against the lawful claims and demands of all persons whomsoever. The mortgagor will pay all taxes assessed against said premises or against this mortgage.

SECOND. The mortgagor consents to a personal deficiency judgment for the debt hereby secured, to the intent that said debt may be paid in full, irrespective of this security; and in the event of suit brought upon this note or mortgage, the mortgagor agrees to pay such sum as the court shall consider reasonable as attorney's fees and costs.

THIRD. Whenever the singular or plural number is used herein, it shall equally include the other, and every mention herein of mortgagor or mortga-

gee shall include the heirs, executors, administrators, successors and assigns of the party or parties so designated.

FOURTH. All gas and electric fixtures, radiators, heaters, engines and machinery, boilers, ranges, elevators, motors, bath-tubs, sinks, water closets, basins, pipes, faucets, and other plumbing and heating fixtures, mirrors, mantels, refrigerating plant and ice-boxes, cooking apparatus and appurtenances, and such other goods and chattels and personal property as are ever furnished by a landlord, in letting or operating an unfurnished building similar to the one herein described and referred to, and which are or shall be attached to said building or buildings by nails, screws, bolts, pipe connections, masonry, or in any other manner, and any building which may be erected during the life of this mortgage upon the land covered hereby, are and shall be deemed to be fixtures and an accession to the freehold and a part of the realty, as between the parties hereto and all persons claiming by, through, or under them, and shall be deemed to be a portion of the security for the indebtedness herein mentioned and be covered by this mortgage.

FIFTH. The mortgagee shall be at liberty, immediately after any default in the payment of the principal of said note or of any installment thereof, or of the interest which shall accrue thereon, or of any tax, assessment, water rate, municipal light or heat rate or charge, or premium of fire insurance, or of any part of either at the respective times therein specified for the payment thereof, upon a

complaint filed or any other proper legal proceeding being commenced for the foreclosure of this mortgage, to apply for, and the said mortgagee shall be entitled, as a matter of right, without consideration of the value of the mortgaged premises as security for the amounts due the mortgagee herein or of the solvency of any person or persons obligated for the payment of such amounts, to the appointment by any court or tribunal, without notice to any party, of a receiver of the rents, issues and profits of the said premises, with power to lease [77] said premises, or such part thereof as may not then be under lease, and with such other powers as may be deemed necessary, who, after deducting all proper charges and expense attending the execution of said trust as receiver, shall apply the residue of said rents and profits to the payment and satisfaction of the amount remaining secured hereby, or to any deficiency which may exist after applying the proceeds of the sale of said premises to the payment of the amount due, including interest and the costs of foreclosure and sale; and the said rents and profits are hereby, in the event of any default or defaults in the payment of said principal, or interest, or of any tax, assessment, water rate, municipal light or heat rate or charge, or insurance, pledged and assigned to the mortgagee, who shall have the right forthwith, after any such default, to enter upon and take possession of the said mortgaged premises and to let the said premises, and to receive the rents, issues, and profits thereof, and apply the same,

after payment of all necessary charges and expense, on account of the amount hereby secured.

SIXTH. The whole of said principal sum shall become due at the option of the mortgagee after default in the payment of interest for thirty days, or after default in the payment of any tax, assessment, water rate, municipal light or heat rate or charge for sixty days after the same shall become due and payable, or after default in the payment of any installment herein mentioned, or immediately upon the actual or threatened demolition or removal of any building erected on said premises.

SEVENTH. The whole of said principal sum and interest shall become due at the option of the mortgagee upon failure of any owner of the above described premises to comply with the requirements of any department of the City of Tacoma within thirty days after notice of such requirement shall have been given to the then owner of said premises by the mortgagee.

EIGHTH. If default be made in the payment of the indebtedness as herein provided or of any part thereof, the mortgagee shall have the power to sell the premises herein described, according to law; said premises may be sold in one parcel, any provision of law to the contrary notwithstanding.

NINTH. The mortgagor will keep the buildings on said premises insured against loss by fire in the sum of at least eight hundred fifty thousand (\$850,000.00), in such manner, terms, and in such companies and for such amounts as may be satisfactory to the mortgagee, until the debt hereby secured is

fully paid, and will keep such policies constantly assigned to the mortgagee, and deliver renewals thereof to Metropolitan Life Insurance Company, at its home office in New York seven days in advance of the expiration of the same, stamped "PAID" by the agent or company issuing the same. Said policies and renewals thereof shall contain the New York standard mortgagee clause, with full contribution clause eliminated. All of said policies shall be written to expire on one and the same date. In the event the mortgagor shall for any reason fail to keep said premises so insured, or shall fail to deliver the policies of insurance or renewals thereof to Metropolitan Life Insurance Company, as aforesaid, or shall fail to pay the premiums thereon, the mortgagee, if he so elects, may have such insurance written and pay the premiums thereon, and any premiums so paid shall be secured by this mortgage and repaid by the mortgagor within ten days after payment thereof by the mortgagee. In default thereof the whole principal sum and interest and insurance premiums, with interest on such sums paid for such insurance from the date of payment, may be and shall become due at the election of the mortgagee, anything herein to the contrary notwithstanding.

TENTH. Should the mortgagee, by reason of any such insurance against loss by fire as aforesaid, receive any sum or sums of money for any damage by fire to the said building or buildings, such amount may be retained and applied by it toward payment of the amount hereby secured; or the same may be

paid over, either wholly or in part, to the mortgagor, to enable the mortgagor to repair said buildings or to erect new buildings in their place, or for any other purpose or object satisfactory to the mortgagee without affecting the lien of this mortgage for the full amount secured thereby before such damage by fire, or such payment over, took place.

ELEVENTH. The mailing of a written notice and demand, by depositing it in any postoffice, station or letter-box, enclosed in a postpaid envelope, addressed to the owner of record of said mortgaged premises and directed to said owner at the last address actually furnished to the holder of this mortgage, or, in default thereof, directed to said owner at said mortgaged premises, shall be sufficient notice and demand in any case arising under this instrument, and required by the provisions thereof or the requirements of law.

TWELFTH. In default of the payment by mortgagor of all or any taxes, charges, and assessments which may be imposed by law upon the said mortgaged premises or any part thereof, or against this mortgage, it shall and may be lawful for the said mortgagee to pay the amount of any such tax, charge, or assessment, with any expenses attending the same; and any amount so paid, the mortgagor shall repay to the mortgagee, on demand, with interest thereon, and the same shall be a lien on the said premises and be secured by the said note and by these presents; and the whole amount hereby secured, if not then due, shall thereupon, if the said mortgagee so elects, become due and payable forthwith. [78]

THIRTEENTH. And it is further mutually covenanted and agreed that in the event of the passage, after the date of this mortgage, of any law of the State of Washington, deducting from the value of land for the purposes of taxation any lien thereon, or changing in any way the laws now in force for the taxation of mortgages or debts secured by mortgage for State or local purposes, or the manner of the collection of any such taxes, so as to affect this mortgage, or the note hereby secured, the whole of the principal sum secured by this mortgage, together with the interest due thereon, shall, at the option of the mortgagee, without notice to any party, become immediately due and payable.

IN WITNESS WHEREOF, the mortgagor has hereunto set its hand and affixes its corporate seal, by its officers thereunto duly authorized, this 10th day of March, 1920.

SCANDINAVIAN-AMERICAN BUILD-
ING COMPANY,

By CHARLES DRURY,

Its President.

Attest J. V. SHELDON,

Its Secretary.

(Scandinavian-American)

(Building Company,)

(Tacoma, Washington,) SEAL

(Corporate Seal.)

State of Washington,

County of Pierce,—ss.

THIS IS TO CERTIFY that on the 10th day

of March, 1920, before me, a Notary Public in and for the State of Washington, personally appeared Charles Drury and J. V. Sheldon, to me known to be the president and secretary respectively of Scandinavian-American Building Company, the corporation which executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

WITNESS my hand and official seal the day and year first above written.

(Signed) E. F. FREEMAN,
Notary Public in and for the State of Washington,
Residing at Tacoma.

State of Washington,)

E. F. Freeman,)

Notary Public.) SEAL

Commission expires)

Sept. 24, 1920.)

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 14, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [79]

**Acknowledgment of Service of Cross-complaint and
Answer of J. P. Duke et al. and Appearance
and Waiver.**

We, the undersigned, hereby acknowledge service of the cross-complaint and answer of defendants J. P. Duke, (as Supervisor of Banking of the State of Washington, and Scandinavian-American Building Company, a corporation, and hereby waive the issuance of subpoena and appear herein in their behalf as to said cross-complaint.

Signed June 14, 1921.

STILES & LATCHAM and
J. F. FITCH,

Attorneys for Ben Olson Company.

Signed June 15th, 1921.

JAMES W. REYNOLDS,
Attorneys for E. E. Davis & Co.,

Signed June —, 1921.

DAVIS & NEAL,
L. R. BONNEVILLE,

Attorneys for Robert M. Davis & Frank C. Neal.

Signed June 15th, 1921.

FLICK & PAUL,

Attorneys for Ann Davis and R. T. Davis, Jr., as
Executors of the Estate of R. T. Davis, Deceased;
R. T. Davis, Jr., Lloyd Davis, Harry L. Davis,
George L. Davis, Maude A. Davis, Marie Davis,
Ruth G. Davis, Hattie Davis Tennant, and
Ann Davis.

Signed June 14th, 1921.

HERBERT S. GRIGGS and
L. R. BONNEVILLE,

Attorneys for St. Paul & Tacoma Lumber Co.

Signed June 14th, 1921.

BURKEY, O'BRIEN & BURKEY,

Attorneys for H. O. Matthews and Frank L. Johns,
Copartners as City Lumber Agency.

Signed June 14th, 1921.

W. W. KEYES,

Attorney for Henry Mohr Hdw. Co.

Signed June 14, 1921.

FITCH & ANDERSON,

Attorneys for Savage-Scofield Company.

Signed June 14th, 1921.

DEWITT M. EVANS,

Attorneys for F. R. Schoen.

Signed June 15, 1921.

H. O. MYERS,

Attorney for H. C. Green, Doing Business as Green
Iron Works. [80]

Signed June 15th, 1921.

D. R. HIPPE,

Attorney for Theo Hedlund, Doing Business as
Atlas Paint Company.

Signed June 14, 1921.

STILES & LATCHAM,

Attorneys for F. H. Godfrey.

Signed June 14th, 1921.

B. S. GROSSCUP and

W. C. MORROW,

Attorneys S. J. Pritchard, C. H. Graves and Emma
Graves, Copartners as P. & G. Lumber Com-
pany.

Signed June 14, 1921.

W. W. KEYES,

Attorney for Hunt Mottet Company.

Signed June 15th, 1921.

HARTMAN & HARTMAN,

Attorneys for W. E. Morris.

Signed June 14, 1921.

B. S. GROSSCUP and

W. C. MORROW, 7

C. A. WALLACE,

Attorneys for Colby Star Mfg. Co.

Signed June 14, 1921.

CHARLES BEDFORD,

Attorneys for M. A. Hansen, A. J. Van Buskirk,
C. W. Crouse, F. L. Swain; D. A. Trolson,
Fred Gustafson, E. Scheibal, Paul Scheibal,
F. J. Kadza, W. Donnellan, P. Hagstrom,
Arthur Purvis, Roy Farnsworth, C. B. Dustin,
L. J. Pettifer, Charles Bond, L. H. Broten,
W. Canaday, L. R. Lilly, F. McNair, Dave
Shields, Ed Lindberg, Joe Tikalsky, F. Mente,
C. Gustafson, George Larson, F. Marcellino,
M. Swanson, William Griswold, O. E. Olson,
C. I. Hill, Emil Johnson, C. Peterson, F. A.
Fetterly, Earl Whitford, Thomas S. Short and
George W. Hicks, Defendants.

R. S. HOLT,

Attorney for Far West Clay Co.

June 14, 1921.

BATES & PETERSON,
Attorneys for Puget Sound Iron & Steel Works.

June 14, 1921.

S. F. McANALLY,
Attorney for C. H. Boedecker-Wm. Owens.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 5, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [81]

**Acknowledgment of Service of Cross-complaint and
Answer of J. P. Duke et al. and Appearance
and Waiver.**

We, the undersigned, hereby acknowledge service of the answer and cross-complaint of J. P. Duke and Scandinavian-American Bank of Tacoma, defendants in the above-entitled cause of action, and hereby waive the issuance of subpoena and appear herein as attorneys to the parties to this action as hereinafter specified in their behalf as to said cross-complaint, this 15th day of June, A. D. 1921.

WALTER M. HARVEY,
Attorney for Edward Miller Cornice & Roofing
Company, a Corporation,

LUND & LUND,
Attorney for Gustaf Johanson.

Attorney for Washington Brick Lime and Sewer
Co., a Corporation,

TEATS, TEATS & TEATS,
Attorneys for J. D. Mullins, Doing Business as
J. D. Mullins Bros.

LYLE, HENDERSON & CARNAHAN,
Attorneys for Tacoma Shipbuilding Co., a Corpora-
tion,

A. O. BURMEISTER,
Attorney for U. S. Machine & Engineering Co. Inc.,
a Corporation.

LOUIS J. MUSCEK,
Attorney for M. Kleiner, Doing Business as Liberty
Lumber and Fuel Company.

E. N. EISENHOWER,
Attorney for Ajax Electric Co.
HAYDEN, LANGHORNE & METZGER,
Attorney for Complainant.

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Southern
Division. Oct. 5, 1921. F. M. Harshberger,
Clerk. By Ed M. Lakin, Deputy. [82]

**Motion of McClintic-Marshall Company to Strike
Part of Answer of Scandinavian-American
Building Company et al.**

Comes now McClintic-Marshall Company, a cor-
poration, complainant, by its attorneys, Hayden,
Langhorne & Metzger, and respectfully moves this
Court to strike from the answer of the Scandina-
vian-American Building Company, a corporation,
and Forbes P. Haskell, Jr., the duly appointed,

qualified and acting receiver of the said Scandinavian-American Building Company by leave of Court first had and obtained to be made a party defendant in this action, the following:

1. From paragraph I all that portion of the same which reads as follows:

“These defendants further allege that by reason of the failure and refusal of the complainant to deliver the structural steel in accordance with the terms of said contract, and within the period provided in said contract for the delivery of said steel, the said Scandinavian-American Building Company suffered great loss and damage and that by the terms of Article X of the Contract, marked Exhibit ‘A,’ and made a part of the complainant’s Amended and Supplemental Bill of Complaint the above matters in dispute were to be arbitrated according to the method provided in said Article X, and that the defendant, Scandinavian-American Building Company, demanded that said matters in dispute be submitted to arbitration, and that complainant refused so to do, by reason whereof these defendants deny that the complainant is entitled to recover any sum of money whatever from these defendants until the terms and conditions of said contract are fully complied with.”

2. From paragraph 2 the following:

“and allege that at the time of filing said lien, the said complainant was without right or authority [83] in law to claim, or to file or

record, any lien whatsoever against the said premises of the defendant, Scandinavian-American Building Company.”

3. All of paragraph V.

4. To strike all of paragraph I of the counterclaim.

5. To strike all of paragraph III of the counterclaim. In the event that the motion to strike all of paragraph III of the counterclaim is denied, then complainant moves to strike that part of paragraph III which reads as follows:

“That said defendant made repeated demands for the adjustment of the matters in dispute, and that complainant failed and refused and still fails and refuses to submit the same to arbitration.”

This motion to strike is based upon the ground that the matters and things moved against are insufficient either as a total or partial defense to this action.

E. M. HAYDEN,
M. A. LANGHORNE,
F. D. METZGER,
Solicitors for Complainant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 25, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [84]

**Order Granting Motion of McClintic-Marshall
Company to Strike Part of Answer of Scandi-
navian-American Bank of Tacoma et al.**

Came on this cause to be heard on this — day of June, 1921, upon the motion of the complainant to strike paragraph I of the affirmative defense as contained in the answer of Scandinavian-American Bank of Tacoma, a corporation, and J. P. Duke as Supervisor of Banks of the State of Washington, which paragraph reads as follows:

“The cross-complainants submit to the judgment of this Honorable Court, and insist that this suit is altogether unnecessary and vexatious, and that, even if the plaintiff be entitled to the sum alleged by it to be due from said defendant, the Scandinavian-American Building Company, the complainant herein is barred from asserting such rights in this action under Article X of the contract, marked Exhibit ‘A,’ and attached to its amended and supplemental bill of complaint herein, for the reason that the claims of the complainant are now and have at all times been disputed and that the complainant herein has repeatedly refused to abide by the terms of said contract, and particularly by the terms of said Article X, and submit such disputes to arbitration, as therein provided, and that the complainant herein, by reason thereof and by reason of its breaches of the said contract referred to in its amended and supplemental bill of complaint herein, has not done equity, and has not come

into this court with clean hands, and it is entitled to no equity at the hands of this court.”

After argument of counsel, and the Court being duly advised in the premises,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AND THIS DOES ORDER, ADJUDGE AND DECREE that said motion be and the same is hereby sustained, and that said paragraph above [85] set out be and the same is hereby stricken from the answer.

To the ruling of the Court and the striking of said paragraph the defendants Scandinavian-American Bank, a corporation, and J. P. Duke as Supervisor of Banks of *Banks* of the State of Washington, excepted, and their exception was noted and allowed.

Done in open court this 27th day of June, 1921.

EDWARD E. CUSHMAN,
District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [86]

Reply of McClintic-Marshall Company to Answer and Cross-complaint of J. P. Duke and Scandinavian-American Bank of Tacoma.

McClintic-Marshall Company, by its attorneys, Hayden, Langhorne & Metzger, for its reply to the answer and cross-complaint of J. P. Duke as Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, says:

I.

This complainant on information and belief says that it is advised that on or about the 2d day of March, 1921, the Penn Mutual Life Insurance Company, a corporation, purported to endorse and assign the note and mortgage mentioned in paragraph 14 of the first cross-bill, to J. P. Duke as Supervisor of Banks of the State of Washington, but this complainant avers and charges the fact to be that said J. P. Duke as Supervisor of Banks of the State of Washington was without any right, power or authority under the laws of the State of Washington to acquire by purchase or otherwise the said note and mortgage, or to take any assignment thereof, and that any purported transfer or assignment of said note and mortgage by the Penn Mutual Life Insurance Company to the said J. P. Duke as Supervisor of Banks of the State of Washington only operated as a payment of a debt due by the Scandinavian-American Bank of Tacoma, a banking corporation, to the said Penn Mutual Life Insurance Company, [87] as will hereafter more fully appear in this reply.

Further your complainant shows and avers the fact to be that on September 1st, 1910, the Scandinavian-American Bank of Tacoma, Washington, was the owner in fee of lots 11 and 12, block 1003, Map of New Tacoma, Washington Territory, which was filed for record in the office of the auditor of Pierce County, Washington, on February 3, 1875; that on said date J. E. Chilberg, the mortgagor mentioned in the mortgage deed of September 2, 1910,

to the Penn Mutual Life Insurance Company, was the president and one of the stockholders of the Scandinavian-American Bank of Tacoma, and it was desired by the said Scandinavian-American Bank of Tacoma to raise the sum of \$100,000, by executing a mortgage on said described property, but for banking reasons the bank did not desire to execute the mortgage in its own name, and it was thereupon agreed between the said Scandinavian-American Bank of Tacoma and the said J. E. Chilberg that said bank would, and it did, without any consideration whatever, deed to the said Chilberg, who at said time was president of said bank, lots 11 and 12, block 1003, Map of New Tacoma, and that said Chilberg would thereupon procure a loan from the Penn Mutual Life Insurance Company, a corporation, in the sum of \$100,000, and that the proceeds so to be derived from the execution of said mortgage would inure to the use and benefit of the said Scandinavian-American Bank of Tacoma, and that just as soon as the said Chilberg did execute said mortgage he and Anna M. Chilberg, his wife, would reconvey said described lots back to the said Scandinavian-American Bank of Tacoma, and accordingly and in pursuance of said agreement the said Scandinavian-American Bank of Tacoma without any consideration [88] being paid to it by the said Chilberg, deeded to said Chilberg the said described lots, and thereupon the said Chilberg and his wife executed a mortgage to the Penn Mutual Life Insurance Company, a corporation, in the sum of \$100,000, and the moneys so obtained by means of

said mortgage are the moneys and property of the said Scandinavian-American Bank of Tacoma, and were used by it for purposes unknown to this complainant; and after the execution of said note and mortgage by the said J. E. Chilberg and Anna M. Chilberg, his wife, to the said Penn Mutual Life Insurance Company, a corporation, the said J. E. Chilberg and Anna M. Chilberg, his wife, deeded said lots back to the said Scandinavian-American Bank of Tacoma, without any consideration being paid by said bank to the said Chilberg and wife, and after the execution of said note and mortgage by the said J. E. Chilberg and Anna M. Chilberg, his wife, to the Penn Mutual Life Insurance Company, a corporation, the Scandinavian-American Bank of Tacoma paid the interest on said note and mortgage and paid \$30,000 of the principal, and on September 5, 1920, the said Scandinavian-American Bank of Tacoma sent its draft for \$70,000 to the Penn Mutual Life Insurance Company, a corporation, the mortgagee, to pay and retire said note and mortgage and to discharge the premises hereinbefore described from the lien of said mortgage; but at the same time the said Scandinavian-American Bank of Tacoma requested an extension and renewal of said note and mortgage, and thereupon and in compliance with said request for an extension of time the said Penn Mutual Life Insurance Company, a corporation, granted the request of the said Scandinavian-American Bank of Tacoma, and returned the said Scandinavian-American Bank of Tacoma its draft for \$70,000, but this [89] complainant does not know

the length of time that was granted by the Penn Mutual Life Insurance Company for the extension of said note and mortgage, but alleges that under the agreement so made and entered into on September, 5, 1920, between the Scandinavian-American Bank of Tacoma and the Penn Mutual Life Insurance Company, a corporation, the said note and mortgage declared upon in this action by the said J. P. Duke as Supervisor of Banks in the State of Washington, was not due; neither was the Scandinavian-American Bank of Tacoma or J. E. Chilberg and Anna M. Chilberg, his wife, in default under any of the terms and conditions of said mortgage deed.

Further replying to the first cross-bill contained in the answer of the said J. P. Duke as Supervisor of Banks of the State of Washington, and the Scandinavian-American Bank of Tacoma, this complainant alleges and avers the following facts: Some time during the latter part of the year 1919, the exact date not being known to complainant, the Scandinavian-American Bank of Tacoma and its officers and directors conceived the plan of razing the building then situated on lots 11 and 12, block 1003, Map of New Tacoma, and erecting thereon a sixteen story structure, at an approximate cost of \$1,200,000, but the capital, surplus and resources of the said Scandinavian-American Bank of Tacoma would not permit said bank to expend that amount of its money in the construction of a new building, as the cost therefor would be in excess of thirty per cent of its capital, surplus, and undivided profits, and would constitute a violation of the banking laws

of the State of Washington, unless the consent of the State Bank Commissioner could first be obtained, and said bank and its officers, well knowing that the consent of the State Bank [90] Commissioner could not be obtained for such a purpose, thereupon conceived the plan of forming a building or holding company to be known as the Scandinavian-American Building Company, and to erect said building through its agency, and thereupon the officers and directors of the Scandinavian-American Bank of Tacoma caused to be incorporated under the laws of the State of Washington a paper corporation, known as the Scandinavian-American Building Company, with a purported capital stock of \$200,000, J. E. Chilberg, president of the Scandinavian-American Bank of Tacoma, and Gustaf Lindberg, one of its directors, being the incorporators, and O. S. Larson, Jafet Lindeberg, J. E. Chilberg, Gustaf Lindberg, Charles Drury, James R. Thompson, and George G. Williamson, were named as the directors of said Scandinavian-American Building Company, all of said named persons being also directors of the Scandinavian-American Bank of Tacoma.

That after the filing in the office of the Secretary of State and County Auditor of Pierce County, Washington, of the Articles of Incorporation of the Scandinavian-American Building Company, all the capital stock of \$200,000 of the said Scandinavian-American Building Company was subscribed for by O. S. Larson, then a director of the Scandinavian-American Bank of Tacoma, and who thereafter suc-

ceeded J. E. Chilberg as president of the Scandinavian-American Bank of Tacoma, excepting one share each that was issued in the name of the directors of the Building Company, who immediately endorsed the certificate of stock so issued to them in blank, and placed the same in charge of the Scandinavian-American Bank of Tacoma. That neither the said O. S. Larson, who subscribed for all of the capital stock of said Scandinavian-American Building [91] Company, except the seven shares issued to the persons named as directors, nor the persons to whom one share each was issued, paid one dollar of their purported subscription.

Further your complainant shows and avers the facts to be that the said Scandinavian-American Bank of Tacoma desired to acquire title to lot 10 of block 1003, Map of New Tacoma, which adjoins lots 11 and 12 of said block 1003, and erect the new building on all of said described lots; that the title to lot 10, block 1003, was in "Drury the Tailor, Inc.," who held the title thereto for the sole benefit and use of Charles Drury, who at the time was one of the directors of the Scandinavian-American Bank of Tacoma, and after the incorporation of the Scandinavian-American Building Company was chairman of the board of directors of the Building Company, and thereupon said Scandinavian-American Bank paid to the said Charles Drury the sum of \$65,000 for said lot 10, block 1003, Map of New Tacoma, and "Drury, the Tailor, Inc.," at the request and instigation of the said Charles Drury, executed a deed to said described lot to the Scandinavian-American

Building Company, the said building company being named as the grantee at the request and instance of the said Scandinavian-American Bank of Tacoma, who paid the purchase price for said lots; and after Drury the Tailor, Inc., conveyed said lot 10, block 1003, Map of New Tacoma, to the Scandinavian-American Building Company, the said Scandinavian-American Bank of Tacoma on, to wit, February 28, 1920, without any consideration whatever, conveyed to the Scandinavian-American Building Company lots 11 and 12, block 1003, Map of New Tacoma.

Complainant further shows that after the incorporation and organization of the Scandinavian-American Building [92] Company, which was as heretofore alleged incorporated and organized at the instigation of the Scandinavian-American Bank of Tacoma, its officers and agents, and after having deeded and caused to be deeded without any consideration moving to it from the said Scandinavian-American Building Company the lots 10, 11 and 12, block 1003, Map of New Tacoma, said Scandinavian-American Bank of Tacoma, through the agency of the Scandinavian-American Building Company, commenced the construction of a large sixteen-story steel structure on said lots, and in the course of construction it paid out large sums of money from its vaults for such purpose, and continued so to do until on or about January 15, 1921, when it became impossible for the said bank to advance further funds to pay for the material and labor used in the construction of said building, and thereupon the

said Scandinavian-American Bank of Tacoma was found and declared to be insolvent by the Banking Department of the State of Washington, and all its property and assets were taken in charge by the State Banking Commissioner of the State of Washington;

WHEREFORE by reason of all of which this complainant says the note and mortgage executed by the said J. E. Chilberg and Anna M. Chilberg, his wife, in the sum of \$100,000, of which note and mortgage J. P. Duke, State Supervisor of Banks of the State of Washington, now claims to be the assignee, and which he is attempting to foreclose, never was the debt or obligation of the said J. E. Chilberg or Anna M. Chilberg, his wife, but was at all times the debt and obligation of the said Scandinavian-American Bank of Tacoma, which fact was well known to the said J. P. Duke as Supervisor of Banks of the State of Washington, and his predecessor in office, prior [93] to the assignment of said note and mortgage by the said Penn Mutual Life Insurance Company, a corporation, to the said Duke, which assignment operated only as the payment and discharge of a debt and obligation of the Scandinavian-American Bank of Tacoma.

For reply to the second cross-bill as contained in the answer of the said J. P. Duke, Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, this complainant says:

That it has no knowledge whatever as to whether or not the Scandinavian-American Building Com-

pany agreed to execute and deliver to the Scandinavian-American Bank of Tacoma bonds of the value of \$350,000 as set forth in paragraph 2 of the second cross-complaint, and it has no knowledge sufficient to form a belief as to whether or not the said Scandinavian-American Building Company agreed to deliver to the said Scandinavian-American Bank of Tacoma the said bonds within a period of four months or at all, and it has no knowledge or information sufficient to form a belief as to the alleged agreement between the said Scandinavian-American Building Company and the said Scandinavian-American Bank of Tacoma, referred to and set forth in said paragraph of the second cross-bill, and it has no knowledge as to its terms as attempted to be set forth therein, wherefore it denies all of the allegations of said paragraph 2.

Complainants says it has no knowledge or information sufficient to form a belief as to the agreement referred to in paragraph 3 of the second cross-complaint was [94] not put on record in reliance upon the alleged agreement of contractors furnishing labor and material, whereby their right to file a lien was waived, and this complainant alleges and avers the fact to be that it never in its contract for the furnishing of material to the Scandinavian-American Building Company waived its right to claim a lien, all of which will more fully appear by a reference to said contract, which is set out as Exhibit "A" to the amended and supplemental complaint filed herein, which contract between complainant and the said Scandinavian-American

Building Company of Tacoma was entered into on February 5, 1920, long prior to the alleged agreement between the Scandinavian-American Building Company, a corporation, and the Scandinavian-American Bank of Tacoma, set forth in paragraph 3 of the second cross-bill.

Further replying to said second cross-bill this complainant admits that the title to lot 10 block 1003, Map of New Tacoma, referred to in paragraph 2 was in "Drury the Tailor, Inc.," and that "Drury the Tailor, Inc.," conveyed said lot to the Scandinavian-American Building Company, and that the title to lots 11 and 12 in block 1003, Map of New Tacoma was in the Scandinavian-American Bank of Tacoma, and that the said bank conveyed the said lots to the said Building Company as set forth in paragraph 2 of said second cross-bill, but as to whether or not the said lots were deeded to said Building Company in consideration of the agreement of the Building Company to deliver the bonds therein referred to to the said bank, it is without any knowledge or information sufficient to form a belief; and it is without any knowledge or information sufficient to form a belief as to whether or not it was a part and parcel of the agreement between the [95] said bank and the said building company, and it has not knowledge or information sufficient to form a belief as to whether a first mortgage in the sum of \$600,000 was to be executed by the said building company covering all of said lots in accordance with the terms of the alleged agreement between the said building company and the said

bank; and it has not knowledge or information sufficient to form a belief as to whether a mortgage in the sum of \$750,000 was to be executed and delivered as a second mortgage on said described premises, and it has no knowledge or information sufficient to form a belief as to whether or not the agreement referred to in said paragraph as Exhibit "A" was actually made between said bank and the said building company, and it never had any knowledge of the existence of said alleged agreement until the filing of the answer in this action.

Further replying to said second cross-bill, this complainant alleges and avers the fact to be that on the 5th day of February, 1920, it entered into a contract with the Scandinavian-American Building Company of Tacoma, Washington, whereby it agreed to furnish and deliver to the said Scandinavian-American Building Company the structural steel work for the building to be erected by the said Scandinavian-American Building Company on the premises described as lots 10, 11, and 12, block 1003, Map of New Tacoma, the terms and conditions of said contract being known not only to the officers and agents of the building company but to the said Scandinavian-American Bank of Tacoma, its officers and agents as well. That between the 22d day of May, 1920, and the 21st day of October, 1920, this complainant furnished material in strict accordance with the terms and conditions of its [96] contract to the Scandinavian-American Building Company of the value of \$263,437.54, no part of

which was ever paid, save and except the sum of \$86,805.17, and that amount was paid according to the best knowledge and information of your complainant by the Scandinavian-American Bank of Tacoma. That on October 21, 1920, there being due to your complainant from said Scandinavian-American Building Company the sum of \$176,-632.37, it filed a notice of claim of lien in the office of the auditor of Pierce County, Washington, claiming a lien on said lots 10, 11 and 12, block 1003, Map of New Tacoma, and on the building erected thereon, a copy of which notice of lien is attached to the amended and supplemental bill of complaint in this case, marked Exhibit "B."

Complainant further alleges that at the time it furnished the material hereinbefore referred to it had no notice or knowledge whatever of the agreement alleged to exist between the Scandinavian-American Building Company and the Scandinavian-American Bank of Tacoma, set forth in the second cross-bill, and it alleges that its said lien is prior to any right of the said Scandinavian-American Bank of Tacoma, and the said John P. Duke, as Supervisor of Banks of the State of Washington, under and by virtue of said alleged contract, so set forth in the second cross-bill of complaint.

Complainant for its reply to the third cross-bill of complaint as contained in the answer of the said J. P. Duke as Supervisor of Banks of the State of Washington, and the Scandinavian-American Bank of Tacoma, a corporation, alleges that it has no knowledge or information sufficient to form a belief

as to whether or not the Scandinavian-American Building [97] Company obtained from the Metropolitan Life Insurance Company any agreement or promise to loan to said Scandinavian-American Building Company the sum of \$600,000 on the lands and premises described in paragraph 2 of the third cross-bill, and it further says that it has no knowledge or information sufficient to form a belief as to whether or not one G. Wallace Simpson represented to the Scandinavian-American Building Company or to any of its officers or agents, that he could or would pledge the mortgage therein referred to as security to obtain money as the work of the building then being constructed by the said Scandinavian-American Building Company progressed, which money or advances were to be repaid to the lenders out of the money expected to be obtained on a mortgage from the said Metropolitan Life Insurance Company when the building was completed, and it therefore denies all of the allegations contained in said paragraph 2.

Complainant denies that the Scandinavian-American Building Company executed and delivered to the said G. Wallace Simpson the note referred to in paragraph 3 of the third cross-bill, in accordance with the agreement therein referred to, and it also denies that said building company executed said note in the due exercise of the powers and authority in that behalf by it possessed, and it also denies that due corporate action was first had for the purpose of making, executing and deliver-

ing the said note as set forth in paragraph 3 of the said third cross-bill.

Complainant also denies that the Scandinavian-American Building Company made, executed and delivered to the said G. Wallace Simpson the mortgage referred to in paragraph 4 of the said third cross-complaint in the due exercise [98] of the powers and authorities by it in that behalf possessed, and it denies that it was executed after corporation action has been first had in respect thereto.

Complainant denies that the Scandinavian-American Building Company commenced the erection of the sixteen-story building referred to in paragraph 7 of the third cross-bill, pursuant to the contracts therein referred to. It also denies that all of the contracts providing for the furnishing of material and labor in the construction of said building contained a provision whereby the right of the person, firm or corporation furnishing labor or material waived his or its right to file a lien, but on the contrary this complainant alleges that its contract set out as Exhibit "A" to the amended and supplemental bill of complaint filed herein, contains no provision whereby this complainant waived its right to file or claim a lien against said building and the premises on which it is situated for material furnished.

Complainant says that whatever sums of money might have been advanced or loaned by the Scandinavian-American Bank of Tacoma to the Scandinavian-American Building Company was not advanced or loaned on the strength or security of the

mortgage alleged to have been made by the Scandinavian-American Building Company to the said G. Wallace Simpson, and this complainant in this connection further alleges that it was contemplated by both the building company and the bank at the time it was decided to erect a sixteen-story steel building on the premises hereinbefore described, that the cost thereof would exceed the sum of \$1,000,000, and that the said Scandinavian-American Bank of Tacoma would be compelled to advance a large sum of money in addition to what might be obtained from [99] the mortgage by the building company to Simpson; and it affirmatively denies that in making any alleged advances referred to in said paragraph the said Scandinavian-American Bank of Tacoma fulfilled the agreement of the said G. Wallace Simpson, therein referred to, to the extent of \$432,822.99, or any other sum.

Further answering said third cross-bill, this complainant alleges and avers the fact to be that the note and mortgage for \$600,000 alleged to have been executed by the Scandinavian-American Building Company to the said G. Wallace Simpson was executed if at all by the president and secretary of the said Scandinavian-American Building Company without any power or authority so to do from the trustees or stockholders of said Scandinavian-American Building Company, and that the execution of the said note and mortgage was not made or performed in pursuance of any power or authority conferred on the said president and secretary of the said Scandinavian-American Building Com-

pany by the vote of a majority or a quorum of the trustees of the Scandinavian-American Building Company at any meeting of the said trustees lawfully assembled, or otherwise, and that the same is therefore invalid and void, as was well known by the said Scandinavian-American Bank of Tacoma at the time it took the alleged assignment of the said note and mortgage from the said G. Wallace Simpson.

Complainant further alleges that the alleged note for \$600,000 and the mortgage securing the same referred to in said third cross-bill were delivered to the said G. Wallace Simpson as agent only for the said Scandinavian-American Building Company, for the express purpose of enabling him to [100] sell and dispose of the same to secure the money therefor, and that the said G. Wallace Simpson had no power or authority to dispose of, sell, assign, transfer or pledge the said note or mortgage except for the purpose of obtaining money therefor. That the said Scandinavian-American Bank of Tacoma well knew the purpose for which the said note for \$600,000 and the mortgage securing the same were delivered to the said Simpson, and well knew that he had no power or authority to sell, assign, or transfer the same except for money received, and this complainant alleges that when the Scandinavian-American Bank of Tacoma took the assignment of said note and mortgage from the said Simpson no money or consideration whatever was paid by the said Scandinavian-American Bank of Tacoma or anyone else on its behalf to the said

G. Wallace Simpson. Complainant further alleges that the said note to the said Simpson and the mortgage purporting to secure the same were executed and delivered to him without any consideration therefor, and during the time the said note and mortgage were held by the said Simpson neither money nor labor nor anything else of value were paid to or received by the said Scandinavian-American Building Company therefor.

Further complainant alleges that some time during the year 1919, the exact date not being known to your complainant, the Scandinavian-American Bank of Tacoma conceived the plan of erecting a large sixteen-story steel building on lots 10, 11 and 12 in block 1003, Map of New Tacoma, but the building planned by it was so costly and expensive that the said bank could not erect the same without investing in it a sum in excess of thirty per cent of its capital, surplus and undivided profits, which would be in [101] violation of the statutes of the state of Washington, unless the consent of the Bank Commissioner thereto was first obtained, and knowing that the consent of the Bank Commissioner could not be obtained thereto, and which consent this complainant on information and belief alleges that he refused, said Scandinavian-American Bank of Tacoma then determined to do indirectly what it was prohibited by statute of the state of Washington from doing directly, and thereupon formed the scheme to erect the said building through the agency of a corporation formed and owned by its own officers, which scheme or plan as developed and carried

out is more fully set forth in complainant's reply to the first cross-bill, set up in the answer of J. P. Duke as Supervisor of Banks of the State of Washington, and the Scandinavian-American Bank of Tacoma, to which reference is hereby made, and complainant now alleges the allegations and statements contained therein and make the same a part of this, its reply to the third cross-bill, as fully and to all intents and purposes as though the same were set forth herein verbatim.

This complainant for its further reply to the third cross-bill, says, that on the 5th day of February, 1920, it entered into a contract with the Scandinavian-American Building Company, wherein and whereby it agreed for a stated consideration to furnish and deliver to the said Scandinavian-American Building Company the structural steel work for the building that said building company was about to erect on lots 10, 11 and 12, block 1003, Map of New Tacoma, and that the terms and conditions of said contract were well known not only to the officers and agents of the Building Company, but to the Scandinavian-American Bank of Tacoma its officers and agents, as well. [102] That at the time said contract just referred to was executed the only apparent lien or encumbrance against the premises on which it was proposed to erect said building was a mortgage of \$100,000, on lots 11 and 12, block 1003, on which the sum of \$30,000 had been paid, executed by J. E. Chilberg and Anna M. Chilberg, his wife, to Penn Mutual Life Insurance Company, a corpora-

tion, and this complainant has no knowledge of the alleged mortgage of \$600,000 from the Scandinavian-American Building Company to the said G. Wallace Simpson, which was not executed until March 10, 1920, long after the contract between your complainant and the Scandinavian-American Building Company had been entered into, and that the said Scandinavian-American Bank of Tacoma had actual knowledge that after the execution of the contract between complainant and the Scandinavian-American Building Company this complainant had commenced to manufacture the structural steel work that was to be used in the construction of said building on the premises hereinbefore described, and it well knew that between May 22, 1920, and October 21, 1920, this complainant had delivered to the Scandinavian-American Building Company material that was actually used in the construction of the building on the lots hereinbefore described, of the value of \$263,437.54, for which it had a right to claim a lien under the statutes of the state of Washington in such cases made and provided, and that your complainant's right to a lien had attached long prior to the time when the said Scandinavian-American Bank of Tacoma received an assignment of the \$600,000 note and mortgage from the said G. Wallace Simpson, and the lien of said mortgage had not attached and no money or other consideration had been paid, advanced or contracted for thereunder. [103]

Further answering the first, second and third cross-bills of J. P. Duke as Supervisor of Banks

of the State of Washington, and Scandinavian-American Bank of Tacoma, so far as the same relate to the allowance of attorney's fees in the event the mortgages therein referred to are foreclosed, complainant says that the amounts claimed are grossly excessive, and that no allowance whatever should be made for attorneys' fees for the reason that the attorneys appearing for the answering defendants and cross-complainants are now being paid a salary by the said J. P. Duke as Supervisor of Banks of the State of Washington, to wind up the affairs of the defunct Scandinavian-American Bank of Tacoma.

WHEREFORE, having made full reply to the answer of the said J. P. Duke and Supervisor of Banks of the State of Washington, and Scandinavian Bank of Tacoma, this complainant prays that said cross-complaints as contained in said answer and each of them be dismissed; that said named defendants and cross-complainants take nothing thereby, and that the lien of this complainant be adjudged and decreed to be prior and superior to any and all claims and demands of the said cross-complainants and each of them in, to or against the real estate hereinbefore described, and that this complainant may have a decree foreclosing its said lien as prayed for in its amended and supplemental bill of complaint filed herein, and for such

other and further relief as to this court may seem meet and agreeable to equity and good conscience.

E. M. HAYDEN,

M. A. LANGHORNE,

F. D. METZGER,

Solicitors for Complainant. [104]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 14, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [105]

Answer and Cross-complaint of Tacoma Millwork Supply Company.

ANSWER AND CROSS-COMPLAINT OF DEFENDANTS ANN DAVIS and R. T. DAVIS, Jr., et al, Copartners Doing Business as TACOMA MILLWORK SUPPLY COMPANY.

To the Honorable E. E. CUSHMAN, Judge of the District Court of the United States, for the Western District of Washington.

Ann Davis and R. T. Davis, Jr., as executors of the Estate of R. T. Davis, deceased; R. T. Davis, Jr., Lloyd Davis; Harry L. Davis; George L. Davis; Maude A. Davis; Marie A. Davis; Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company answer the bill of complaint on file in this case and bring this their cross-complaint against the Scandinavian-American Build-

ing Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of the said State; Scandinavian-American Bank, a corporation organized under and by virtue of the laws of the State of Washington, and a citizen of the said state; G. Wallace Simpson, a citizen of the State of Missouri; Metropolitan Life Insurance Company, a corporation duly organized under and by virtue of the laws of the State of New York and a citizen of said State; Penn Mutual Life Insurance Company, a corporation organized under and by virtue of the laws of the State of Pennsylvania and a citizen of said State; P. Claude Hay, State Bank Commissioner for the State of Washington and a citizen of the State of Washington; Forbes P. Haskell, Deputy State Bank Commissioner for the State of Washington, and a citizen of the State of Washington; McClintic-Marshall Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania and a citizen of said state. [106]

Thereupon these answering defendants and cross-complainants do hereby answer the bill of complaint of said plaintiff McClintic-Marshall Company and bring their bill by way of cross-complaint against the parties above named as follows:

I.

For answer to paragraphs I, II, III, IV, V, VI, VII, VIII and IX of said complaint these answering defendants admit the same.

II.

For answer to paragraphs X and XI of said complaint these answering defendants have not the information or belief as to the matters and things therein contained and therefore deny the same excepting that the grounds and premises therein referred to are necessary for the construction and convenient use of said building.

III.

For answer to paragraph II of said complaint these answering defendants have not information or belief as to the matters and things therein contained and therefore deny the same.

IV.

For answer to paragraph XIII of said complaint these answering defendants admit the same excepting that portion thereof relating to the claims of these answering defendants and cross-complainants.

V.

For answer to paragraph XIV of said complaint (erroneously styled IX) these answering defendants admit the reasonableness of the attorney's fee expressed in said paragraph in the event that a lien in the amount prayed for by plaintiff is allowed. [107]

These answering defendants and cross-complainants specifically deny each and every allegation of said bill of complaint not herein now specifically admitted.

By way of cross-complaint allege as follows:

I.

That R. T. Davis, Jr., Lloyd Davis, Harry L.

Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, are copartners doing business under the name and style of Tacoma Millwork Supply Company, and that with the exception of Hattie Davis Tennant, who is a citizen of the State of California, these cross-complainants are each and all of them citizens of the State of Washington.

II.

That the Scandinavian-American Building Company is a corporation organized and existing under the laws of the State of Washington, and is a citizen of said State.

III.

That the Scandinavian-American Bank is a corporation organized and existing under the laws of the State of Washington, and is a citizen of said State.

IV.

On information and belief the defendant G. Wallace Simpson is a citizen of the State of Missouri.

V.

That the defendant, P. Claude Hay, is the duly appointed, qualified and acting State Bank Commissioner for the State of Washington, and the defendant Forbes P. Haskell is the duly appointed, qualified and acting Deputy State Bank Commissioner for [108] the State of Washington, and the defendant Forbes P. Haskell is the duly appointed, qualified and acting Deputy State Bank Commissioner for the State of Washington, and

the said P. Claude Hay and the said Forbes P. Haskell are citizens of the State of Washington.

VI.

That Penn Mutual Life Insurance Company is a corporation organized and existing under the laws of the State of Pennsylvania, and is a citizen of said State.

VII.

That Metropolitan Life Insurance Company is a corporation organized and existing under the laws of the State of New York, and is a citizen of said State.

VIII.

That McClintic-Marshall Company is a corporation organized and existing under the laws of the State of Pennsylvania, and is a citizen of said State.

IX.

That said G. Wallace Simpson was acting in the interest of and as a conduit for the Metropolitan Life Insurance Company in the execution and filing of that certain mortgage hereinafter referred to as having been executed by the Scandinavian-American Building Company, a corporation, to said G. Wallace Simpson.

X.

Further your cross-complainants show that the matter and amount recited in their cross-complaint, exceed, exclusive of costs, the sum or value of \$3,000.

XI.

That at all the times hereinafter and in this cross-complaint [109] mentioned the defendant Scandinavian-American Building Company, a cor-

poration, was and now is the Owner of Lots Ten (10), Eleven (11) and Twelve (12), in Block One Thousand and Three (1003), as the same are shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," which was filed for record in the office of the auditor of Pierce County, Washington Territory, February 3, 1875.

XII.

That on or about the 28th day of February, 1920, your cross-complainants entered into written contracts with defendant Scandinavian-American Building Company, true copies of which are hereto attached and marked Exhibits "A," "B" and "C," Exhibit "A" comprising contract for the delivery of general millwork for the building to be erected upon the property hereinbefore described, Exhibit "B" comprising a contract for the millwork with respect to bank fixtures, and Exhibit "C" having reference to the erection of the millwork hereinbefore referred to as distinguished from its manufacture.

XIII.

That thereafter and in accordance with the terms of said main or manufacturing contract, namely, Exhibit "A," and said bank fixtures contract, namely, Exhibit "B," your cross-complainants between the 28th day of February, 1920, and January 17, 1921, manufactured and delivered to said Scandinavian-American Building Company a total of manufactured material specially designed for the building to be erected and being erected upon the premises hereinbefore described, and not otherwise

useable, a total in value of \$44,548.41, being the reasonable and agreed value of said goods.

That your cross-complainants are and were at all times ready to fully complete said contract and that a reasonable [110] profit on the remaining portion of contracts "A" and "B" is and would be Three Thousand (\$3,000) Dollars and that your cross-complainants having no security other than as provided by the lien statutes of the State of Washington, did on the 19th day of January, 1921, duly file their claim upon said premises hereinbefore described, having first duly verified said lien and properly ensealed it and said lien was so drawn as to be entitled to be placed of record and that said lien was duly recorded as Auditor's file No. 585424 in the office of the Auditor for Pierce County, it being numbered in such manner in accordance with the system in vogue in said office for the numbering of liens.

XIV.

Further your cross-complainants show that all of said material so manufactured, sold and delivered to said Scandinavian-American Building Company is necessary and useable solely and alone and is to be used in the completion of that certain sixteen-story building situate upon the lands and premises hereinbefore described, all of said lands and premises being necessary for the construction and convenient use of said building.

XV.

Your cross-complainants further show that on, to wit, January 17, 1921, there being then due from

said Scandinavian-American Building Company to your cross-complainants the sum of \$44,548.41, with interest from said date at the rate of six per cent per annum, and the said Scandinavian-American Building Company having definitely declined and having theretofore failed and refused to pay for the amounts due upon said contract and admitting its inability to pay, and these your cross-complainants being without any security for the payment [111] of said money excepting as provided by the lien statutes of the State of Washington, duly filed and recorded with the County Auditor for Pierce County, Washington, being the county in which said property is situate, their claim of lien duly verified by oath and properly ensealed, claiming therein the full value of the said manufactured material, which lien is of record as Auditor's file number 585115 in accordance with the system of numbering liens in vogue in the office of the Auditor of Pierce County, Washington, the said lien being in such form and so drawn as to entitle it to be placed of record in accordance with the statutes in such cases made and provided.

XVI.

That the contract Exhibit "C," being a contract for the erection of the two several characters of mill work hereinbefore referred to as being manufactured under Exhibits "A" and "B" attached hereto and made part hereof, was entered into contemporaneously with the said other or remaining contracts by these your cross-complainants, and formed and is a part of the consideration entering

into the two remaining contracts and was all one and the same transaction, each contract being a consideration for the entry into the other, and that a reasonable profit to be derived out of said contract known as Exhibit "C" hereto attached, being the erection contract, would be and is the sum of Ten Thousand Five Hundred (\$10,500.00) Dollars, and that the said cross-complainants have no security for payment of said amount just mentioned except as given them by the lien statutes of the State of Washington in such cases made and provided, and that they did execute and caused to be filed of record in the office of the County Auditor of Pierce County their lien in the amount of \$10,500.00 describing the [112] property hereinbefore referred to and asking a lien thereon for the amount mentioned, having duly verified said lien and it being property ensealed in accordance with the Statutes of the State of Washington and being in such form and so drawn as to entitle it to be placed of record, being recorded as Auditor's file Number 585425 in accordance with the system of numbering liens in vogue in the office of the Auditor of Pierce County, Washington.

XVII.

Further, that the said Scandinavian-American Building Company is wholly insolvent. That there are certain assets of said company that are in danger of dissipation. That the building being erected is unfinished even as to its structural steel content, is open to the weather and will rapidly deteriorate, depreciating the value of the liens thereon filed,

and that it is necessary that a receiver be appointed to properly care for the assets of said building company and in particular protect the said building and to advise with this Court upon some plan for its completion or disposal.

XVIII.

Your cross-complainants further show and represent to this Court that they have been compelled to employ attorneys for the purpose of protecting and preserving their interest and enforcing their said liens and that under and by virtue of Section 1141 of Remington & Ballinger's Code and Statutes of the State of Washington they are entitled to an allowance of a reasonable attorney's fee which they allege and aver to be the sum of \$4,500.00.

XIX.

Your cross-complainants respectfully show to this Court [113] that Scandinavian-American Bank, a corporation, one of defendants herein; Scandinavian-American Building Company, a corporation, one of defendants herein; G. Wallace Simpson, one of defendants herein; Penn Mutual Life Insurance Company, a corporation, an additional defendant herein; Metropolitan Life Insurance Company, a corporation, one of the additional defendants herein; P. Claude Hay and Forbes P. Haskell, State Bank Commissioner and Deputy Bank Commissioner respectively, defendants herein, claim some right, title, estate or interest in said premises but whatever the nature of said right, title, estate or interest or claim may be, if any, the same is junior, subsequent and inferior to the lien of said cross-

complainants, with the exception of the lien of the Penn Mutual Life Insurance Company which your cross-complainants herein admit is a superior, prior and first lien upon said premises, being in the nature of a first mortgage.

In consideration whereof, and forasmuch as your cross-complainants are remediless in the premises according to the strict rule of the common law, and can only have relief in a court of equity where matters of this kind are properly cognizable, your cross-complainants therefore pray the decree of this Honorable Court:

I.

That the plaintiff and remaining defendants and each of them may be required to make answer respectively unto all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were herein expressed, and they thereunto particularly interrogated, but not under oath, answer under oath being hereby expressly waived. [114]

II.

That your cross-complainants may have a judgment against the defendant Scandinavian-American Building Company for the sum of \$44,548.41 plus \$3,000, with interest thereon at the rate of six per cent per annum from date hereof; for the sum of \$10,500.00 with interest thereon at the rate of six per cent per annum from date hereof, together with the further sum of \$4,500.00 as and for attorneys' fees for the foreclosure of their said liens, and for all their costs and expenses herein incurred, and to

be incurred, and that the same and the whole thereof be adjudged a first and valid lien against the lands and premises hereinbefore described. Further your cross-complainants pray that said lands and premises and the building thereon situated be adjudged and decreed to be sold in satisfaction of the amount so found due to your cross-complainants according to law and the practice of this court, and that the proceeds of such sale be applied in payment of the costs of these proceedings and sale and reasonable attorneys' fees in the sum of \$4,500.00, and your said cross-complainants' claim amounting to the sum of \$48,048.41, besides interest as hereinbefore specified.

Further your cross-complainants pray that said plaintiff and the remaining defendants and all persons claiming under them or either of them subsequent to the filing and recording of your cross-complainants' liens in the office of the Auditor of Pierce County, Washington, either as purchasers or encumbrancers, lienors or otherwise, may be barred and foreclosed of all right, claim or equity of redemption in the said premises and every part thereof, and that they may have a judgment and execution against the defendant Scandinavian-American Building Company for any deficiency which may remain after applying all the proceeds of the sale of said premises [115] properly applicable to the satisfaction of their said judgment. That your cross-complainants or any other parties to this suit may become a purchaser at said sale, and that the officer executing the sale shall execute

and deliver the necessary conveyances to the purchaser or purchasers, and that said purchaser or purchasers at said sale may be let into the possession of said premises.

III.

That your cross-complainants may have such other and further relief in the premises as may be just and equitable and as your Honor may deem just, and the appointment of a receiver as indicated.

May it please your Honor to grant to your cross-complainants writs of subpoena, to be directed to the plaintiff and to the remaining defendants, therein and thereby commanding them and each of them at a certain time and under a certain penalty therein to be named to be and appear before your Honor in this Honorable Court, then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to stand to and abide and perform such other and further orders or decrees as to your Honor shall seem meet.

FLICK & PAUL,

Attorneys for Ann Davis and R. T. Davis, Jr., as
Executors of the Estate of R. T. Davis, Deceased;
R. T. Davis, et al., Copartners Doing
Business Under the Name and Style of Tacoma
Millwork Supply Co. [116]

United States of America,
Western District of Washington,
Southern Division,—ss.

R. T. Davis, being duly sworn, deposes and says:
That he is one of the copartners of the Tacoma

Millwork Supply Company and acting agent of the remaining copartners; that he has read the foregoing answer and cross-complaint, knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes the same to be true.

R. T. DAVIS.

Subscribed and sworn to before me this 19th day of January, 1921.

Notary Public in and for the State of Washington,
Residing at Tacoma. [117]

Exhibit "A."

TACOMA MILLWORK SUPPLY CO.

Tacoma, Wash., Feb. 17th, 1920.

Mr. Frederick Webber, Archt.

Tacoma, Wash.

Dear Sir:

Re: 16 Story Scandinavian American Bank Bldg.

Confirming our verbal conversation of this morning, we will agree, to furnish you with all of the "Millwork" for the above building, (with the exception of Bank Quarters) and as per your plans and specifications, and the following understanding, for the sum of Sixty-five Thousand Dollars (\$65,000.00) net cash.

It is understood by the above general term "Millwork" that we furnish no flooring, glass, or hardware, or metal covered work.

It is also understood that the material for the exterior window frames and sash shall be of V. G. Fir. The interior trim thruout to be of Philippine Mahogany, with the doors veneered with the harder species on stiles and rails, with panels of Honduras Mahogany.

It is our suggestion that the Painter's primeing be done by you at our factory, before delivery, as without this precaution we could not guarantee the work.

As to the terms of payment, we would expect 75% of the estimated value of the work delivered, or accepted for delivery, to be paid us on or before the 10th of the current month, for all of the previous month's work, and the balance of 25% retained to be paid within 30 to 60 days of completion and acceptance of the entire contract. Bond to be furnished by Owner.

Respectfully submitted,
TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS,
Jr. Mgr. [118]

Exhibit "B."

THIS AGREEMENT, made this 28th day of February, A. D. 1920, by and between Scandinavian-American Building Company, a corporation, hereinafter called the "Owner," party of the first part, and Tacoma Millwork Supply Co. hereinafter called the "Contractor," party of the second part.

WITNESSETH:

WHEREAS, the said Scandinavian-American

Building Company, Owner, is about to begin the erection of a 16-story building on the property situated in Pierce County, Washington, described as follows: Lots Ten (10), Eleven (11) and Twelve (12) in Block One Thousand Three (1003), as shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Penn., architect, and

WHEREAS, the said Tacoma Millwork Supply Co. is desirous of entering into a contract with the said Scandinavian American Building Company, Owner, to furnish

The exterior window frames together with the transome sash, for the First floor Banking Quarters, as per the plans and details, for the sum of Nineteen Hundred Fifty-seven Dollars, \$1957.00. Also to furnish labor of fitting the sash in the frames and putting on the interior mouldings, at an extra cost of \$171.00, all as per estimates of Feb. 25th, attached hereto.

under and subject to all terms, limitations and conditions contained in the plans and specifications hereinbefore referred to.

NOW THIS AGREEMENT WITNESSETH,

ART. I. That in consideration of the agreements herein contained, the Owner agreed to pay to the Contractor, the sum of Two Thousand One Hundred Twenty-eight (\$2128.00) Dollars in installments as hereinafter stated. Said payments, however, in no

way lessening the total and final responsibility of the [119] Contractor. No payment shall be construed or considered as an acceptance of any defective work or improper material.

Although it is distinctly understood and agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible, yet for the convenience of the Contractor, it is stipulated that payments shall be made as follows:

75% monthly to be paid in cash, upon the 15th, of each month, provided estimates are furnished to the Architect, on or before the first of each month, of the estimated value of the work delivered and erected, and the balance of 25% to be paid within 30 to 60 days from completion and acceptance of the "Millwork" erection covered by this contract.

ART. II. The said Contractor hereby covenants, promises and agrees to do all of the aforesaid work to be furnished and finished agreeably to the satisfaction, approval and acceptance of the said Owner, according to the true intent and meaning of the drawings, plans and specifications made by said Architect, which said plans, drawings and specifications are to be considered as part and parcel of this agreement, as fully as if they were at length herein set forth, and the said Contractor is to include and do all necessary work under his contract, not particularly specified, but required to be furnished and done in order to fully complete and fulfill his contract to the satisfaction of the said Architect and Owner aforesaid.

ART. III. The Contractor hereby agrees that time shall be considered the very essence of this contract and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the Contractors are working. And the said Contractor further covenants and agrees to perform the work promptly, without notice on the part of any one, so as to complete the building at the earliest [120] possible moment.

ART. IV. The Contractor further covenants and agrees to observe carefully the progress of the work upon the entire building without notice from any one, and to procure drawings at least two weeks prior to executing the work, and to perform his portion of the work upon said building at the earliest proper time for such work, and to be responsible for all loss occasioned directly and indirectly by any lack of knowledge upon his part, as to the proper time to perform his work.

ART. V. The said Contractor shall complete the several portions and the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz:

All of the work aforementioned to be delivered and erected so that the whole can be completed within ten (10) months from the date of this contract, and to be delivered and erected as fast as the building will permit.

ART. VI. Should the Contractor be delayed in the progress of the work under this contract by strike, or common carrier, or casualty wholly beyond

the control of the Contractor, then the time herein designated for the completion of said work shall be extended for a period equivalent to the time lost, but no such allowance shall be made unless a claim therefor is presented in writing by the Contractor within twenty-four hours of the occurrence of such delay.

ART. VII. And in case of default in any part of the said work within the times and periods above specified, the Contractor hereby promises and agrees to pay the Owner, and the Owner may deduct from any amount coming to the Contractor the sum of Fifty (\$50.00) dollars for each and every day's delay until the completion of the work, not in the nature of a penalty, but in the nature of liquidated damages for the delay caused to the Owner in the completion of the work [121]

ART. VIII. Any imperfect workmanship or other faults which may appear within one year after the completion of said work, and in the judgment of said Architect arising out of improper materials or workmanship, shall, upon the direction of said Architect, be amended and made good by, and at the expense of, said Contractor, and in case of default so to do, the Owner may recover from said Contractor the cost of making good the work.

ART. IX. The Contractor hereby agrees to remove the dirt and rubbish accumulating on the premises, caused by the construction of his work, at such time or times as he may be instructed by the Owner or his representatives, and if not removed promptly by the Contractor, the Owner is hereby

authorized to remove the same at the expense of the said Contractor, and to deduct the cost thereof from any balance that may be due and owing him.

ART. X. And should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality or fail in any respect to prosecute the work with promptness and diligence or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect or the Owner, the latter shall be at liberty after two days' written notice to the Contractor to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect or the Owner shall certify that such refusal, neglect or failure is sufficient ground for action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession [122] for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon and to employ any other person or persons to finish the work and provide the materials therefor; and in case of such discontinuance of the employment of the Contractor, the latter shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work said excess shall be paid

by the Owner to the Contractor; but if said expenses shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expenses incurred by the Owner as herein provided, either for furnishing the materials or for finishing the work and any damage incurred through such default shall be itemized and certified by the Owner, which itemized statement shall be conclusive upon the Contractor.

ART. XI. And the Owner reserved the right, that if there be any omission or neglect on the part of the said Contractor of the requirements of this agreement and the drawings, plans and specification, the said Owner may, at its discretion, declare this contract, or any portion thereof, forfeited; which declaration and forfeiture shall exonerate, free, and discharge the said Owner from any and all obligations and liabilities arising under this contract, the same as if this agreement had never been made; and any amount due the Contractor by reason of work done or materials furnished prior to the forfeiture of this contract shall be retained by the said Owner until the full completion and acceptance of the building upon which said work has been done or said material furnished, at which time the said Owner, after deducting [123] all costs and expenses occasioned by the default of the said Contractor, shall pay or cause to be paid to him the balance with a statement of all said costs and expenses.

ART. XII. And the Contractor further covenants, promises and agrees that he will make no charge for any extra work performed or materials fur-

nished in and about his contract, and he hereby expressly waives all right to any such compensation, unless he shall first receive an order in writing for the same from the Owner.

ART. XIII. And the Contractor hereby assumes entire responsibility and liability in and for any damage to persons or property during the fulfillment of this contract, caused directly or indirectly by the Contractor, his agents or employees, and the Contractor agrees at his own expense to carry sufficient liability and workmen's compensation insurance and to enter in and defend the Owner against, and save it harmless from loss or annoyance by reason of suits or claims of any kind on account of such alleged or actual damages; or on account of alleged or actual infringements of patents in regard to any method, device or apparatus, or any part thereof, put in, under, or in connection with this contract, or used in fulfilling the same.

The Contractor hereby further agrees not to assign or sublet in any manner whatsoever, any part or portion of this contract, without the written consent of the Owner, upon the express penalty of forfeiture of the entire contract, in the discretion of the Owner.

ART. XIV. And the Contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanic's claim or lien against said premises, and hereby expressly agrees not to file any claim or [124] lien

whatsoever against the premises involved in this contract.

ART. XV. And the Contractor shall at all times, when required by the Owner, before receiving any moneys under this contract, produce satisfactory vouchers and receipts from all employees and materialmen for work done and materials furnished in and about the erection and completion of the building covered by the contract.

ART. XVI. And any and all work that may be cut out and omitted from this contract, during the progress of the work, shall be allowed by the Contractor at the regular contract price, and shall be adjusted and agreed upon by said parties before the final settlement of their accounts.

ART. XVII. The Owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part thereof, or to any of the materials or other things done, furnished and supplied by the Contractor, used and employed in finishing and completing the same.

ART. XVIII. It is hereby further mutually covenanted, promised and agreed, by and between the said parties, that in the event of any dispute or disagreement hereafter arising between them as to the character, style or portion of the work on said buildings to be done, or materials to be furnished under this contract, or the plans and specifications hereinbefore referred to, or any other matter in connection herewith, the same shall be referred to three

arbitrators, one to be chosen by each of the parties hereto, and the third by the two arbitrators so selected, whose decision, or that of a majority of them in the matter, shall be final and binding upon them.
[125]

ART. XIX. The Contractor shall, upon request from the Owner, furnish forthwith a bond or bonds in form and substance and with surety satisfactory to the Owner, in the sum of One Thousand Dollars, (\$1000.00), conditioned for the true and faithful performance of this contract on the part of the Contractor.

ART. XX. All negotiations and agreements, oral or written, prior to this agreement, are merged herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except by the mutual consent of the parties endorsed hereon in writing and duly executed.

The Contractor has read and fully understands this agreement and the said Contractor hereby certifies that before the execution of this agreement he examined all the plans and specifications prepared in connection with the contract.

And it is further agreed that the covenants, promises and agreements herein contained shall be binding and final upon the heirs, executors, administrators and successors of the parties hereto.

IN WITNESS WHEREOF, the said parties have

hereunto set their hands and seals the day and year first above written.

SCANDINAVIAN-AMERICAN BUILD-
ING CO.

By CHARLES DRURY,
Its President.

J. V. SHELDON,
Its Secretary.

TACOMA MILLWORK SUPPLY CO.,

By R. T. DAVIS, Jr.,
G. L. DAVIS,
Contractor. [126]

THIS AGREEMENT made this 28th day of February, A. D. 1920, by and between Scandinavian-American Building Company, a corporation, hereinafter called the owner, party of the first part, and Tacoma Millwork Supply Company, hereinafter called the contractor, party of the second part.

WITNESSETH.

WHEREAS, the said Scandinavian-American Building Company, Owners is about to begin the erection of a 16-story building on the property situated in Pierce County, Washington, described as follows: Lots Ten (10), Eleven (11), and Twelve (12) in Block One thousand three (1003), as shown and designated on a certain plat entitled, "Map of New Tacoma, W. T.," of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Penn., architect, and

WHEREAS, the said Tacoma Millwork Supply Co. is desirous of entering into a contract with the said Scandinavian-American Building Company, Owner, to furnish all of the interior millwork with the exception of Bank Quarter; also, all of the exterior window and door frames, for the sum of Sixty-five thousand (\$65,000) Dollars.

All plaster grounds to be furnished at price of \$8.00 per thousand lineal feet on $\frac{3}{4} \times 1\frac{5}{8}$ grounds, according to estimates furnished by party of the second part, dated Feb. 17th and 18th, 1920, under and subject to all terms, limitations and conditions contained in the plans and specifications hereinabove referred to.

NOW THIS AGREEMENT WITNESSETH,

ART. I. That in consideration of the agreements herein contained, the Owner agrees to pay to the Contractor the sum of Sixty-five Thousand (\$65,000.00) Dollars in installments as hereinafter stated. Said payments, however, in no way lessening the total and final responsibility of the Contractor. No payment shall be construed or considered as an acceptance of defective work or improper material.

Although it is definitely understood and agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible, yet for the convenience of the contractor, it is stipulated that payment shall be made as follows:

75% monthly to be paid in cash upon the 15th of each month, provided estimates are furnished to

the Architect on or before the first of each month, of the estimated value of the work delivered and erected, and the balance of 25% to be paid within 30 to 60 days from completion and acceptance of the millwork material furnished and covered by this contract.

ART. II. The said Contractor hereby covenants, promises and agrees to do all the aforesaid work to be furnished and finished agreeable to the satisfaction, approval and acceptance of the Architect of said building and to the satisfaction, approval and acceptance of the said Owner, according to the true intent and meaning of the drawings, plans and specifications made by said Architect, which said plans, drawings and specifications are to be considered as part and parcel of this agreement, as fully as if they were at [127] length herein set forth, and the said Contractor is to include and do all necessary work under his contract, not particularly specified, but required to be furnished and done in order to fully complete and fulfill his contract to the satisfaction of the said Architect and Owner aforesaid.

ART. III. The Contractor hereby agrees that time shall be considered the very essence of this contract and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the contractors are working. And the said Contractor further covenants and agrees to perform the work promptly, without notice on the part of anyone, so as to complete the building at the earliest possible moment.

ART. IV. The Contractor further covenants and agrees to observe carefully the progress of the work upon the entire building, without notice from anyone and to procure drawings at least two weeks prior to executing the work, and to perform his portion of the work upon said building at the earliest proper time for such work, and to be responsible for all loss occasioned directly and indirectly by any lack of knowledge upon his part, as to the proper time to perform his work.

ART. V. The said Contractor shall complete the several portions and the whole of the work, comprehended under this agreement by and at the time or times hereinafter stated, viz.: All the work aforementioned to be delivered and put in place so that the whole can be completed in ten (10) months from date of this contract, and to be delivered as fast as the building will permit.

ART. VI. Should the Contractor be delayed in the progress of the work under this contract by strike, or common carrier, or casualty wholly beyond the control of the Contractor, then the time herein designated for the completion of said work, shall be extended for a period equivalent to the time lost, but no such allowance shall be made unless a claim therefor is presented in writing by the Contractor within twenty-four hours of the occurrence of such delay.

ART. VII. And in case of default in any part of the said work within the times and periods above specified, the Contractor hereby promises and agrees to pay the owner, and the owner may de-

duct from any amount coming to the Contractor the sum of Fifty (\$50) Dollars for each and every day's delay until the completion of the work, not in the nature of a penalty, but in the nature of liquidated damages for the delay caused to the owner in the completion of the work.

ART. VIII. Any unperfect workmanship or other faults which may appear within one year after the completion of said work, and in the judgment of said Architect arising out of improper materials or workmanship, shall, upon the direction of said Architect, be amended and made good by, and at the expense of, said Contractor, and in case of default so to do, the Owner may recover from said Contractor the cost of making good the work.

ART. IX. The Contractor hereby agrees to remove the dirt and rubbish accumulated on the premises caused by the construction of his work, at such time or times as he may be instructed by the Owner or his representatives, and if not removed promptly by the Contractor, the Owner is hereby authorized to remove the same at [128] the expense of the said contractor, and to deduct the cost thereof from any balance that may be due and owing him.

ART. X. And should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or materials of the proper quality or fail in any respect to prosecute the work with promptness and diligence or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect or the Owner, the latter shall be at

liberty after two days' written notice to the contractor to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect or Owner shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon and to employ any other person or persons to finish the work and provide the materials therefor, and in case of such discontinuance of the employment of the Contractor, the latter shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished at which time if the unpaid balance of the amount to be paid under this contract shall exceed the expenses incurred by the Owner in finishing the work said excess shall be paid by the Owner to the Contractor; but if said expenses shall exceed such unpaid balance the Contractor shall pay the difference to the Owner. The expenses incurred by the Owner as herein provided either for furnishing the materials or for finishing the work and any damage incurred through such default shall be itemized and certified by the Owner, which itemized statement shall be conclusive upon the Contractor.

ART. XI. And the Owner reserves the right, that if there be any omission or neglect on the

part of the said Contractor or the requirements of this agreement and the drawings, plans and specifications, the said Owner may, at its discretion, declare this contract, or any portion thereof, forfeited; which declaration and forfeiture shall exonerate, free and discharge the said Owner from any and all obligations and liabilities arising under this contract, the same as if this agreement had never been made; and any amount due the Contractor by reason of work done or materials furnished prior to the forfeiture of this contract, shall be retained by the said Owner until the full completion and acceptance of the building upon which the said work has been done or the said materials furnished, at which time the said Owner, after deducting all costs and expenses occasioned by the default of the said Contractor, shall pay or cause to be paid to him the balance with a statement of all said costs and expenses.

ART. XII. And the contractor further covenants, promises and agrees that he will make no charge for any extra work performed or materials in and about his contract, and he hereby expressly waives all right to any such compensation, unless he shall first receive an order in writing for the same from the Owner.

ART. XIII. And the Contractor hereby assumes entire responsibility and liability in and for any damage to persons or property during the fulfillment of this contract, caused directly or indirectly by the Contractor, his agents or employees, and the Contractor agrees at his own expense to carry

sufficient liability and workmen's compensation insurance and to enter in and defend the [129] Owner against, and save it harmless from loss or annoyance by reason of suits or claims of any kind on account of such alleged or actual damages, or on account of alleged or actual infringements of patents in regard to any method, device or apparatus, or any part thereof, put in, under or in connection with this contract, or used in fulfilling the same.

The Contractor hereby further agrees not to assign or sublet in any manner whatsoever, any part or portion of this contract, without the written consent of the Owner, upon the express penalty of forfeiture of the entire contract, in the discretion of the Owner.

ART. XIV. And the Contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all rights to any mechanic's lien or claim against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.

ART. XV. And the Contractor shall at all times when required by the owner, before receiving any moneys under this contract, produce satisfactory vouchers and receipts from all employees and materialmen for work done and materials furnished in and about the erection and completion of the building covered by this contract.

ART. XVI. And any and all work that may be cut out and omitted from this contract, during the

progress of the work, shall be allowed by the contractor at the regular contract price, and shall be adjusted and agreed upon by said parties before the final settlement of their accounts.

ART. XVII. The Owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part thereof, or to any of the materials or other things done, furnished and supplied by the Contractor, used and employed in finishing and completing the same.

ART. XVIII. It is hereby mutually covenanted, promised and agreed by and between the said parties that in the event of any dispute or disagreement hereafter arising between them as to the character, style or portion of the work on said buildings to be done, or materials to be furnished under this contract, or the plans and specifications hereinabove referred to, or any other matter in connection herewith, and the same shall be referred to three arbitrators, one to be chosen by each of the parties hereto, and the third by the two arbitrators so selected, whose decision, or that of a majority of them in the matter, shall be final and binding upon them.

ART. XIX. The Contractor shall, upon request from the owner, furnish forthwith a bond or bonds in form and substance and with surety satisfactory to the Owner, in the sum of Thirty-two thousand (\$32,000) Dollars, conditioned for the true and faithful performance of this contract on the part of the Contractor.

ART. XX. All negotiations and agreements, oral or written, prior to this agreement, are merged herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except [130] by the mutual consent of the parties endorsed hereon in writing and duly executed.

The Contractor has read and fully understands this agreement and the said Contractor hereby certifies that before the execution of this agreement he examined all the plans and specifications prepared in connection with the contract.

And it is further agreed that the covenants, promises and agreements herein contained shall be binding and final upon the heirs, executors, administrators and successors of the parties hereto.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of
SCANDINAVIAN-AMERICAN BUILD-
ING CO.

By CHARLES DRURY,
Its President.

J. SHELDON,
Its Secretary.

TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS, Jr.
G. L. DAVIS,
Contractor. [131]

Exhibit "B."

Tacoma, Wash., Feb. 25, 1920.

Mr. Frederick Weber, Archt.,

Tacoma, Wash.

Re: Sixteen Story Scandinavian Bank Bldg.

Dear Sir:

We will agree to furnish you with the exterior window frames, together with the transom sash, for the First Floor Banking Quarters as per the plans and our details, for the sum of \$1,957.00. This, of course, included no glass, no setting of frames, or labor erecting. However, we estimate the labor of fitting the sash in the frames and putting on the interior mouldings at \$171.00, making a total of \$2,128.00.

Respectfully yours,

TACOMA MILLWORK SUPPLY CO.,

By R. T. DAVIS, Jr.,

Manager. [132]

Exhibit "C."

THIS AGREEMENT, made this 28th day of February, A. D. 1920, by and between Scandinavian-American Building Company, a corporation, hereinafter called the "Owner," party of the first part, and Tacoma Millwork Supply Co. hereinafter called the "Contractor," party of the second part.

WITNESSETH.

WHEREAS, the said Scandinavian-American Building Company, Owner, is about to begin the

erection of a 16-story building on the property situated in Pierce County, Washington, described as follows: Lot Ten (10), Eleven (11) and Twelve (12) in Block One Thousand Three (1003), as shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Penn., architect, and

WHEREAS, the said Tacoma Millwork Supply Co. is desirous of entering into a contract with the said Scandinavian-American Building Company, Owner, to furnish

All of the interior "Millwork" to be erected complete, according to the plans and specifications, for the sum of Thirty Thousand Dollars (\$30,000.00).

Also to furnish complete, the bucks, as per details for the sum of Twelve Hundred Sixty-six Dollars (\$1266.00). All according to estimates furnished by the party of the second part, dated February 17th and 18th, 1920.

under and subject to all terms, limitations and conditions contained in the plans and specifications hereinbefore referred to.

NOW THIS AGREEMENT WITNESSETH,

ART. I. That in consideration of the agreements herein contained, the Owner agreed to pay to the Contractor, the sum of Thirty-one Thousand Two Hundred Sixty-six Dollars (\$31,266.00) in installments as hereinafter stated. Said payments, [133]

however, in no way lessening the total and final responsibility of the Contractor. No payment shall be construed or considered as an acceptance of any defective work or improper material.

Although it is distinctly understood and agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible, yet for the convenience of the Contractor, it is stipulated that payments shall be made as follows:

75% monthly to be paid in cash, upon the 15th of each month, provided estimates are furnished to the architect, on or before the 1st of each month, of the estimated value of the work delivered and erected, and the balance of 25% to be paid within thirty to sixty days, from completion and acceptance of the work and material covered by this contract.

ART. II. The said Contractor hereby covenants, promises and agrees to do all of the aforesaid work to be furnished and finished agreeably to the satisfaction, approval and acceptance of the Architect of said building and to the satisfaction, approval and acceptance of the said Owner, according to the true intent and meaning of the drawings, plans and specifications made by said Architect, which said plans, drawings and specifications are to be considered as part and parcel of this agreement, as fully as if they were at length herein set forth, and the said Contractor is to include and do all necessary work under his contract, not particularly specified, but required to be furnished

and done in order to fully complete and fulfill his contract to the satisfaction of the said Architect and Owner aforesaid.

ART. III. The Contractor hereby agrees that time shall be considered the very essence of this contract, and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the Contractors are working. [134] And the said Contractor further covenants and agrees to perform the work promptly, without notice on the part of anyone, so as to complete the building at the earliest possible moment.

ART. IV. The Contractor further covenants and agrees to observe carefully the progress of the work upon the entire building, without notice from anyone, and to procure drawings at least two weeks prior to executing the work, and to perform his portion of the work upon said building at the earliest proper time for such work, and to be responsible for all loss occasioned directly and indirectly by any lack of knowledge upon his part, as to the proper time to perform his work.

ART. V. The said Contractor shall complete the several portions and the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz.:

All of the work aforementioned to be delivered and erected so that the whole can be completed in ten (10) months from the date of this contract, and to be erected as fast as the building will permit.

ART. VI. Should the Contractor be delayed in the progress of the work under this contract by strike, or common carrier, or casualty wholly beyond the control of the Contractor, then the time herein designated for the completion of said work shall be extended for a period equivalent to the time lost, but no such allowance shall be made unless a claim therefor is presented in writing by the Contractor within twenty-four hours of the occurrence of such delay.

ART. VII. And in case of default in any part of the said work within the times and periods above specified, the Contractor hereby promises and agrees to pay the Owner, and [135] the Owner may deduct from any amount coming to the Contractor the sum of Fifty (\$50.00) Dollars for each and every day's delay until the completion of the work, not in the nature of a penalty, but in the nature of liquidated damages for the delay caused to the Owner in the completion of the work.

ART. VIII. Any imperfect workmanship or other faults which may appear within one year after the completion of said work, and in the judgment of said Architect arising out of improper materials or workmanship, shall, upon the direction of said Architect, be amended and made good by, and at the expense of, said Contractor, and in case of default so to do, the Owner may recover from said Contractor the cost of making good the work.

ART. IX. The Contractor hereby agrees to remove the dirt and rubbish accumulating on the premises, caused by the construction of his work,

at such time or times as he may be instructed by the Owner or his representatives, and if not removed promptly by the Contractor, the Owner is hereby authorized to remove the same at the expense of the said Contractor, and to deduct the cost thereof from any balance that may be due and owing him.

ART. X. And should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality or fail in any respect to prosecute the work with promptness and diligence or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect or the Owner, the latter shall be at liberty after two days' written notice to the Contractor to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the [136] Contractor under this contract; and if the Architect or the Owner shall certify that such refusal, neglect or failure is sufficient grounds for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon and to employ any other person or persons to finish the work and provide the materials therefor; and in case of such discontinuance of the employment of the Contractor, the latter shall not be entitled to receive any further

payment under this contract until the said work shall be wholly finished, at which time if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work said excess shall be paid by the Owner to the Contractor; but if said expenses shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expenses incurred by the Owner as herein provided, either for furnishing the materials or for finishing the work and any damage incurred through such default shall be itemized and certified by the Owner, which itemized statement shall be conclusive upon the Contractor.

ART. XI. And the Owner reserved the right, that if there *by* any omission or neglect on the part of the said Contractor of the requirements of this agreement and the drawings, plans and specification, the said Owner may, at its discretion, declare this contract, or any portion thereof, forfeited; which declaration and forfeiture shall exonerate, free, and discharge the said Owner from any and all obligations and liabilities arising under this contract, the same as if this agreement had never been made; and any amount due the Contractor by reason [137] of work done or materials furnished prior to the forfeiture of this contract shall be retained by the said Owner until the full completion and acceptance of the building upon which said work has been done or said materials furnished, at which time the said Owner, after deducting all costs and expenses occasioned by the default of the said

Contractor, shall pay or cause to be paid to him the balance with a statement of all said costs and expenses.

ART. XII. And the Contractor further covenants, promises and agrees that he will make no charge for any extra work performed or materials furnished in and about his contract, and he hereby expressly waives all right to any such compensation, unless he shall first receive an order in writing for the same from the Owner.

ART. XIII. And the Contractor hereby assumes entire responsibility and liability in and for any damage to persons or property during the fulfillment of this contract, caused directly or indirectly by the Contractor, his agents or employees, and the Contractor agrees at his own expense to carry sufficient liability and workmen's compensation insurance and to enter in and defend the Owner against, and save it harmless from loss or annoyance by reason of suits or claims of any kind on account of such alleged or actual damages; or on account of alleged or actual infringements of patents in regard to any method, device or apparatus, or any part thereof, put in, under, or in connection with this contract, or used in fulfilling the same.

The Contractor hereby further agrees not to assign or sublet in any manner whatsoever, any part or portion of this contract, without the written consent of the Owner, upon the express penalty of forfeiture of the entire contract, in the [138] discretion of the Owner.

ART. XIV. And the Contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all rights to any mechanic's claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.

ART. XV. And the Contractor shall at all times, when required by the Owner, before receiving any moneys under this contract, produce satisfactory vouchers and receipts from all employees and materialmen for work done and materials furnished in and about the erection and completion of the building covered by this contract.

ART. XVI. And any and all work that may be cut out and omitted from this contract, during the progress of the work, shall be allowed by the Contractor at the regular contract price, and shall be adjusted and agreed upon by said parties before the final settlement of their accounts.

ART. XVII. The owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part thereof, or to any of the materials or other things done, furnished and supplied by the Contractor, used and employed in finishing and completing the same.

ART. XVIII. It is hereby further mutually covenanted, promised and agreed, by and between the said parties, that in the event of any dispute or disagreement hereafter arising between them as to the character, style or portion of the work on

said building to be done, or materials to be furnished under this contract, or the plans and specifications hereinbefore referred to, or any other matter in connection herewith. [139]

Exhibit "C."

Tacoma, Wash., Feb. 18th, 1920.

Mr. Frederick Webber, Archt.

Tacoma, Wash.

Dear Sir:

Re: 16-Story Scandinavian-American Bank Bldg.

We will agree to furnish you with all of the door-bucks for the above building, as per your plans, for the sum of \$1,266.00.

We are also pleased to make you a price of \$8.00 per thousand lineal feet, on the $\frac{3}{4} \times 1\frac{5}{8}$ " plaster grounds.

The door-bucks would come plowed on the back, cut to proper lengths, and notched for beader.

Respectfully submitted,

TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS, Jr.,

Mgr.

Bond to paid for by owner. [140]

Exhibit "C."

TACOMA MILLWORK SUPPLY CO.

Tacoma, Wash. Feb. 17th, 1920.

Mr. Frederick Webber, Archt.,

Tacoma, Wash.

Dear Sir:

Re: 16 Story Scandinavian-American Bank Bldg.

We will agree to furnish all of the labor and

equipment necessary, to full erect all of the "Millwork" in the above building, as per your plans and specifications and in first-class shape, for the sum of Thirty Thousand Dollars, (\$30,000.00). The fitting and placing of all hardware on the above "Millwork" is included.

It is understood that the "Owner" will set the window frames, and furnish and set the door-bucks, and grounds.

The terms of payment to be as outlined in our "Millwork" bid of even date.

Bond to be paid for by owner.

Respectfully submitted,
TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS, Jr.,
Mgr. [141]

**Reply to Answer and Cross-complaint of Tacoma
Millwork Supply Co.**

Now comes McClintic-Marshall Company, complainant, and for its reply to the cross-complaint of Ann Davis et als., says:

I.

Admits paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII of said cross-complaint.

II.

Replying to paragraph XIII of said cross-complaint, this complainant says that it has no knowledge or information sufficient to form a belief as to the matters and things therein alleged, and therefore denies the same, the whole and every part

thereof, and each and every allegation therein contained, save that on or about the 19th day of January, 1921, said cross-complainants filed in the office of the County Auditor of Pierce County, Washington, their claim of lien against the lands and premises described in said notice of lien.

III.

Replying to paragraph XIV of said cross-complaint, this complainant says that it has no knowledge or information sufficient to form a belief as to the matters and things therein alleged, and it therefore denies the same, the whole and every [142] part thereof, and each and every allegation therein contained.

IV.

Replying to paragraph XV of said cross-complaint, this complainant says that it has no knowledge or information sufficient to form a belief as to the matters and things therein alleged, and it therefore denies the same, the whole and every part thereof, and each and every allegation therein contained, save and except that it admits that the said cross-complainants filed a claim of lien in the office of the County Auditor of Pierce County, Washington, against the lands and premises described in said notice of lien.

V.

Replying to paragraph XVI of said cross-complaint, this complainant says that it has no knowledge or information sufficient to form a belief as to the matters and things therein alleged, and it therefore denies the same, the whole and every part

thereof, and each and every allegation therein contained, save that this complainant admits that said cross-complainants filed a claim of lien in the office of the Auditor of Pierce County, Washington, as alleged in said paragraph.

VI.

Admits the allegations contained in paragraph XVII of said cross-complaint.

VII.

Replying to paragraph XVIII of said cross-complaint, this complainant admits that the cross-complainants have been compelled to employ attorneys, and further admits that they are entitled to a reasonable attorney's fee if they succeed in establishing a lien against the lands and premises against which said lien is claimed. [143]

For a further reply to the cross-complaint of Ann Davis et als., this complainant says: That said cross-complainants should not be allowed to claim or assert that they now have a lien in any amount whatsoever against the lands and premises described in the original cross-complaint and notices of liens, for the reason that in the contract said to have been made and entered in to on the 28th day of February, 1920, between Scandinavian-American Building Company, a corporation, one of the defendants herein, and Tacoma Millwork Supply Company, said company consisting of Ann Davis and others, it was agreed in Article XIV of said contract, set forth as Exhibit "A" to the cross-complaint, as follows:

“And the contractor further agrees for himself, his heirs, executors, administrators and assigns, to waive any and all right to any mechanics’ claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.”

WHEREFORE, having made full reply to the cross-complaint, this complainant reiterates its prayer for relief as contained in the original bill of complaint.

ELMER M. HAYDEN,
MAURICE A. LANGHORNE and
F. D. METZGER,

Attorneys for Complainant.

Office and P. O. Address: Suite 523 Tacoma Bldg.,
Tacoma, Wash.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 4, 1921. F. M. Harshberger, Clerk, By Ed M. Lakin, Deputy. [144]

Answer and Amended or Supplemental Cross-complaint of Defendants Ann Davis and R. T. Davis, Jr., et al., Copartners Doing Business as Tacoma Millwork & Supply Company.

To the Honorable E. E. CUSHMAN, Judge of the District Court of the United States, for the Western District of Washington:

Ann Davis and R. T. Davis, Jr., as executors of the Estate of R. T. Davis, Deceased, R. T. Davis,

Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company answer the bill of complaint on file in this case and bring this their answer and amended or supplemental cross-complaint against the Scandinavian-American Building Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said State; Scandinavian-American Bank, [145] a corporation organized under and by virtue of the laws of the State of Washington and a citizen of the said State; G. Wallace Simpson, a citizen of the State of Missouri; Metropolitan Life Insurance Company, a corporation duly organized under and by virtue of the laws of the State of New York and a citizen of said State; Penn Mutual Life Insurance Company, a corporation organized under and by virtue of the laws of the State of Pennsylvania and a citizen of said State; P. Claude Hay, State Bank Commissioner for the State of Washington and a citizen of the State of Washington, Forbes P. Haskell, Deputy State Bank Commissioner for the State of Washington, and a citizen of the State of Washington; McClintic-Marshall Company, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania and a citizen of said State.

Thereupon these answering defendants and cross-complainants do hereby answer the amended

or supplemental bill of complaint of said plaintiff McClintic-Marshall Company and bring their bill by way of cross-complaint against the parties above-named as follows:

I.

For answer to Paragraphs I, II, III, IV, V, VI, VII, VIII, and IX, X, XI, XII, XIII, XIV, and XX of said complaint these answering defendants admit same.

II.

For answer to Paragraphs XV and XVI of said complaint these answering defendants have not information or belief as to the matters and things therein contained and therefore deny the same excepting that the grounds and premises therein referred to are necessary for the construction and convenient use of said building.

III.

For answer to Paragraph XVII of said complaint these answering defendants have not information or belief as to the matters and things therein contained and therefore deny the same. [146]

IV.

For answer to Paragraph XVIII of said complaint these answering defendants admit the same excepting that portion thereof relating to the claims of these answering defendants and cross-complainants.

V.

For answer to Paragraph XIX of said complaint these answering defendants admit the reasonableness of the attorneys' fee expressed in said para-

graph in the event that a lien in the amount prayed for by plaintiff is allowed.

These answering defendants and cross-complainants specifically deny each and every allegation of said bill of complaint not herein now specifically admitted.

By way of cross-complaint allege as follows:

I.

That R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis are copartners doing business under the name and style of Tacoma Millwork Supply Company, and that with the exception of Hattie Davis Tennant, who is a citizen of the State of California, these cross-complainants are each and all of them citizens of the State of Washington.

II.

That the Scandinavian-American Building Company is a corporation organized and existing under the laws of the State of Washington, and is a citizen of said State.

III.

That the Scandinavian-American Bank is a corporation organized and existing under the laws of the State of Washington, and is a citizen of said State. [147]

IV.

On information and belief the defendant G. Wallace Simpson is a citizen of the State of Missouri.

V.

That the defendant, P. Claude Hay, is the duly

appointed, qualified and acting State Bank Commissioner for the State of Washington, and the defendant Forbes P. Haskell is the duly appointed, qualified and acting Deputy State Bank Commissioner for the State of Washington, and the said P. Claude Hay and the said Forbes P. Haskell are citizens of the State of Washington.

VI.

That Penn Mutual Life Insurance Company is a corporation organized and existing under the laws of the State of Pennsylvania, and is a citizen of said State.

VII.

That Metropolitan Life Insurance Company is a corporation organized and existing under the laws of the State of New York, and is a citizen of said State.

VIII.

That McClintic-Marshall Company is a corporation organized and existing under the laws of the State of Pennsylvania and is a citizen of said State.

IX.

That said G. Wallace Simpson was acting in the interest of and as a conduit for the Metropolitan Life Insurance Company in the execution and filing of that certain mortgage hereinafter referred to as having been executed by the Scandinavian-American Building Company, a corporation, to said G. Wallace Simpson.

X.

Further your cross-complainants show that the

matter and amount recited in their cross-complaint, exceed, exclusive of costs, [148] the sum or value of \$3,000.

XI.

That at all the times hereinafter and in this cross-complaint mentioned the defendant Scandinavian-American Building Company, a corporation, was and now is the owner of Lots Ten (10), Eleven (11) and Twelve (12), in Block One Thousand and Three (1003), as the same are shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," which was filed for record in the office of the auditor of Pierce County, Washington Territory, February 3, 1875.

XII.

That on or about the 28th day of February, 1920, your cross-complainants entered into written contracts under the circumstances hereinafter stated with defendant Scandinavian-American Building Company, true copies of which are attached to original answer and cross-complaint of these answering defendants on file herein, and marked Exhibits "A," "B" and "C," Exhibit "A" comprising contract for the delivery of general millwork for the building to be erected upon the property hereinbefore described, Exhibit "B" comprising a contract for the millwork with respect to bank fixtures, and Exhibit "C" having reference to the erection of the millwork hereinbefore referred to as distinguished from its manufacture.

XIII.

That thereafter and in accordance with the terms

of said main or manufacturing contract, namely, Exhibit "A," and said bank fixtures contract, namely, Exhibit "B," your cross-complainants between the 28th day of February, 1920, and January 17, 1921, manufactured and delivered to said Scandinavian-American Building Company a total of manufactured material specially designed for the building to be erected and being erected upon the premises hereinbefore described, and not otherwise usable, a total in value of \$60,512.92, being the reasonable and agreed value of said goods. [149]

That your cross-complainants are and were at all times ready to fully complete said contract and that a reasonable profit on the remaining portion of contracts A and B is and would be \$1,000.00, and that your cross-complainants having no security other than as provided by the lien statutes of the State of Washington, did on the 19th day of January, 1921, duly file their claim upon said premises hereinbefore described, having first duly verified said lien and properly ensealed it and said lien was so drawn as to be entitled to be placed of record and that said lien was duly recorded as Auditor's file No. 585424 in the office of the Auditor for Pierce County, it being numbered in such manner in accordance with the system in vogue in said office for the numbering of liens, now amended by lien duly filed April 7, 1921.

XIV.

Further your cross-complainants show that all of said material so manufactured, sold and delivered to said Scandinavian-American Building Com-

pany is necessary and usable solely and alone and is to be used in the completion of that certain sixteen story building situate upon the lands and premises hereinbefore described, all of said lands and premises being necessary for the construction and convenient use of said building.

XV.

Your cross-complainants further show that on, to wit, January 17, 1921, there being then due from said Scandinavian-American Building Company to your cross-complainants the sum of \$69,507.83, with interest from said date at the rate of six per cent per annum, and the said Scandinavian-American Building Company having definitely declined and having theretofore failed and refused to pay for the amounts due upon said contract and admitting its inability to pay, and these your cross-complainants being without [150] any security for the payment of said money excepting as provided by the lien statutes of the State of Washington, duly filed and recorded with the County Auditor for Pierce County, Washington, being the county in which said property is situate, their claim of lien duly verified by oath and properly ensealed, claiming therein the full value of the said manufactured material, which lien is of record as Auditor's file Number 585115 in accordance with the system of numbering liens in vogue in the office of the Auditor of Pierce County, Washington, the said lien being in such form and so drawn as to entitle it to be placed of record in accordance with the statutes in such cases made and provided, filed as amended April 7, 1921.

XVI.

That the contract Exhibit "C," being a contract for the erection of the two several characters of millwork hereinbefore referred to as being manufactured under Exhibits "A" and "B" attached hereto and made part hereof, was entered into contemporaneously with the said other or remaining contracts by these your cross-complainants, and formed and is a part of the consideration entering into the two remaining contracts and was all one and the same transaction, each contract being a consideration for the entry into the other, and that a reasonable profit still to be derived out of said contract known as Exhibit "C" hereto attached, being the erection contract, would be and is the sum of \$6,000.00, and that the said cross-complainants have no security for payment of said amount just mentioned except as given them by the lien statutes of the State of Washington in such cases made and provided, and that they did execute and caused to be filed of record in the office of the County Auditor of Pierce County their lien in the amount of \$10,-500.00, describing the property hereinbefore referred to and asking a lien thereon for the amount mentioned, now amended by lien duly filed April 7, 1921, segregating work already done. [151] Having duly verified said lien and it being properly ensealed in accordance with the Statutes of the State of Washington and being in such form and so drawn as to entitle it to be placed of record, being recorded as Auditor's file Number 585425 in accordance with the system of numbering liens in

vogue in the office of the Auditor of Pierce County, Washington.

That in addition to the foregoing your cross-complainants, under the terms and conditions of the contracts herein set forth and pursuant to the usual method of handling said work, did a great deal of work upon said manufactured products by way of assembling the various parts, which work is of the reasonable value of \$6043.00, and that in order to better secure the same a lien was duly filed in accordance with statutes in such cases made and provided in Pierce County, Washington, under Auditor's file Number 593021 on the 7th day of April, 1921, and that said lien comprises a total by way of amendment inclusive of the charge herein just recited of all the labor, material and profit claimed by these cross-complainants under their various contracts and the additional work given them by said Building Company.

XVII.

Further, that the said Scandinavian-American Building Company is wholly insolvent and was insolvent at date of signing said contracts was said bank; and both admit that payment can only be made through foreclosure of liens on the property involved.

XVIII.

Your cross-complainants further show and represent to this Court that they have been compelled to employ attorneys for the purpose of protecting and preserving their interest and enforcing their said liens and that under and by virtue of section 1141

of Remington & Ballinger's Codes and Statutes of the State of Washington they are entitled to an allowance of a reasonable attorneys' fee which they allege and aver to be the sum of \$6000. [152]

XIX.

Your cross-complainants respectfully show to this Court that Scandinavian-American Bank, a corporation, one of the defendants herein; Scandinavian-American Building Company, a corporation, one of defendants herein; G. Wallace Simpson, one of defendants herein; Penn Mutual Life Insurance Company, a corporation, an additional defendant herein; Metropolitan Life Insurance Company, a corporation, one of the additional defendants herein; P. Claude Hay and Forbes P. Haskell, State Bank Commissioner and Deputy Bank Commissioner respectively, defendants herein, claim some right, title, estate or interest in said premises but whatever the nature of said right, title, estate or interest or claim may be, if any, the same is junior, subsequent and inferior to the lien of said cross-complainants, with the exception of the lien of the Penn Mutual Life Insurance Company which your cross-complainants herein admit is a superior, prior and first lien upon said premises, being in the nature of a first mortgage.

XX.

That at about the time that these cross-complainants were submitting bids upon the work to be done as herein referred to upon the Scandinavian-American Bank Building at Tacoma, Washington, the board of trustees of said defendant Building Com-

pany were and remained during all times in issue, identical with the Board of Trustees of the Scandinavian-American Bank, one of the defendants herein, a banking corporation organized under the laws of the State of Washington, and that the following named persons, additional defendants herein, constituted the Board of Trustees of the two institutions named:

Gust Lindberg.	Dean Johnson.
Chas. Drury.	J. V. Sheldon.
G. G. Williamson.	Frank M. Lanborn.
Ole S. Larson. [153]	

XXI.

That at said time the said Building Company had entered upon negotiations through its Trustees with one G. W. Simpson, another defendant herein, who was or held himself out to be an agent for the Metropolitan Life Insurance Company for the making of loans, and had also entered into negotiations at the instance of said Simpson with one Webber, an architect, who jointly with said Simpson was to furnish certain mortgage moneys hereinafter referred to, and that said Simpson is a citizen of the State of Missouri at said time, as these cross-complainants are informed, believe and state the fact to be, and the said Webber is a citizen of the State of Pennsylvania, said Webber being an additional defendant herein.

XXII.

That at the time that these cross-complainants were submitting their bids upon the work comprised in Exhibits "A," "B," and "C," attached to this

cross-complaint and made a part hereof, the said parties mentioned in this paragraph unlawfully conspired together to advance to said Scandinavian-American Building Company moneys of the said Bank for the purpose of building the structure in issue, necessary to erect said building other than the mortgage moneys hereinafter referred to and conspired to keep such facts secret from the public, from the State Banking Department and from the contractors and parties interested in the erection of said building.

XXIII.

That they further conspired to acquire the stock of said Scandinavian-American Building Company and did so, keeping the same secret from the public, the State Banking Department and these your cross-complainants and others similarly situated, with the view to manipulating said stock as an asset to falsely cover up the insolvency which then existed of said institution. [154]

XXIV.

That they further conspired with each other to and did represent to these your cross-complainants and others similarly situated that the said Simpson and said Webber had already obtained a complete commitment from the Metropolitan Life Insurance Company for the making of a loan of \$600,000 to be evidenced by a mortgage lien upon said building inferior only to that of the Penn Mutual Life Insurance Company, and together agreed and conspired to make a further representation to said cross-complainants and others similarly situated,

that they had already at hand all of the moneys necessary to make the initial or complement payments for the full erection of said building with the exception of said \$600,000 herein just referred to, and that well knowing that they had neither said moneys just referred to nor the commitment mentioned, and well knowing that said building would cost in excess of \$1,000,000 and after finding out sometime in August of 1920 that said \$600,000 mortgage could not be procured, they still conspired to keep such fact secret from said your cross-complainants and others similarly situated and on or about October 1920, without consideration, caused the transfer of said mortgage from said Simpson to said Bank, all of which matters and things said Webber and said Simpson were fully aware, gave consent thereto and aided therein, and still continuing the fraud perpetrated on your cross-complainants the said defendants agreed to keep secret the assignment of said mortgage and ultimately to pretend and claim that said mortgage was and would be security for any advances theretofore or subsequently made by said bank to said Building Company, kept said assignment from record during all times that said bank was a going institution.

XXV.

That on or about the 18th day of February, 1920, while the final negotiations for a contract was on between said Building [155] Company and said your cross-complainants, the said parties mentioned in the foregoing paragraph among them particularly said Larson, said Drury, said Simpson and said

Webber, with the knowledge of the remaining parties mentioned in said paragraph acting in their official capacities and for themselves, represented to your cross-complainants that the initial moneys as stated in the foregoing paragraph were at hand, that the commitment for the \$600,000 was definitely secured, and on objection by these cross-complainants to the form of contract submitted particularly regarding waiver of lien and other provisions such as arbitration, further stated that all of the contracts had been drawn by the eastern syndicate represented by said Simpson and said Webber in uniform style as to waiver of liens and other specific provisions, and that all of the contracts must be signed in an exactly similar form and that all would be signed without change whatsoever; that each and all of said representations were false, were known to be false by the parties making the same, were made with intent to induce these your cross-complainants to sign said contracts, and that said your cross-complainants wholly relying upon said representations and without knowledge of the falsity thereof and without any knowledge as to the conspiracy herein referred to and as to the use of the moneys of the Scandinavian-American Bank in the premises agreed to and did sign said contracts as they appear attached to the cross-complaint herein referred to.

XXVI.

That all of the parties interested in said building similarly situated with your cross-complainants signed the respective contracts without consulta-

tion with others similarly situated or knowledge or any special arrangements entered into with such others.

XXVII.

That both said institutions known as the bank and the [156] building company were wholly insolvent at the time of these transactions, all of which was well-known to the said board of directors, and said officers including said Simpson and Webber well knew that certain of said proposing bidders or contractors who are now lien claimants would not yield to the conditions contained in said contracts without change and well knowing that there was no money at hand, that no commitment had yet been made on the \$600,000 mortgage, that the moneys at the bank in this instance was against public policy and in the face of the specific statute of the State of Washington, and after full knowledge that said mortgage of \$600,000 could not be obtained, and after certain of said contractors had entered into agreements differing in form and substance from the agreements signed by these your answering cross-complainants, still failed and neglected to advise your answering cross-complainants of this situation fraudulently keeping all these matters secret so as to induce these your answering cross-complainants to continue against their interests to manufacture and deliver material to said job.

That said trustees and said defendant Building Company, said Simpson and said Webber particularly kept from these your answering cross-complainants and others similarly situated, the fact

of the assignment of said \$600,000 mortgage to said bank, which at all times said defendants had represented to these your answering cross-complainants and others similarly situated was to produce moneys to be paid out only for the final \$600,000 of work and material delivered into said building. [157]

XXVIII.

That said cross-complainants would not have signed said contracts in said form or at all except because of their reliance on the statements made, and because of the belief that they were true, and would have refused particularly to waive their lien upon said property or to acquiesce in arbitration if any of said statements so recited had been known to be false, and would have instantly ceased manufacture and delivery under said contracts herein referred to if any of the facts herein recited as occurring subsequent to the signing of said contracts had come to their notice.

XXIX.

That the plaintiff McClintic-Marshall Company claim, as do certain other parties to this action that their liens are superior to those of these cross-complainants, but plaintiff is informed and believes the fact to be, and therefore states the same as a fact under said information and belief, that there is reasonable chargeable against said plaintiff demurrage in the amount of \$60,000 for failure to deliver steel within contract time and for other delays, and further asserts that the lien of said Webber, the architect herein referred to, because of his participation in the fraud herein recited should be denied

as a lien in the premises and that for the reasons herein set out, the liens of these cross-complainants are superior and paramount to the liens of all excepting lien claimants similarly situated and are superior and paramount to the claims of all the remaining parties to this action.

XXX.

That since the filing of the original cross-complaint in this action the receiver for said bank caused to be paid with the funds of said bank the mortgage heretofore referred to as that of the Penn Mutual Life Insurance Company, and that said mortgage has been since said time assigned to said receiver. [158]

XXXI.

That the Exhibits "A-1," "B-1," "C-1," "E-1," "F-1," and "G-1" represent the materials manufactured and delivered upon said job or place in storage or still at the factory of these your cross-complainants, all of which is specially constructed work or so cut up that it cannot be used except upon the job here in issue and specially designed for said job and all of which was done in accordance with the several contracts A, B and C herein referred to and that the reasonable value of the total claim of these your cross-complainants against said company and said building is \$69,507.83 as evidenced by the said several exhibits beginning with "A-1" and concluding with "G-1" and that the said several exhibits relate themselves to the work here involved and as related to the several

contracts (true copies of which are now on file in said cause), as follows:

Exhibit "A-1" is material manufactured under the main contract ready for delivery or actually delivered totalling \$58,555.92.

Exhibit "B-1" is fir door-bucks cut and ready for delivery in the amount of \$1,266.00, which amount comes under a fixed contract and comprises the reasonable value of said work and material, and relates to Exhibit "C" attached to the original cross-complaint. Exhibit "C-1" is the reasonable value of frames, stops, casing, etc., comprising the banking-rooms of said building and falls under Exhibit "B," known as the banking-room contract attached to the original cross-complaint now on file in this court, and said work and material is of the reasonable value of \$1957.00.

Exhibit "D-1" relates itself to Exhibit "C" attached to the original cross-complaint on file in said cause and comprises the work or erection contract in the amount of \$6,043.00 specified on said Exhibit "D-1" in the reasonable value of labor done in the progress of said work by way of making same ready for installation in said building. [159]

Exhibit "E-1" and "F-1" comprise certain amounts in the total of \$200.00 and \$8.00, respectively, on open contract representing the reasonable value of said work and materials set out in said two exhibits ordered at the special instance and request of said trustees of said Building Company.

Exhibit "G-1" represents the charge for contractor's surety bond in the total amount of \$718.41,

which is a reasonable charge for such bond and was duly agreed to be paid by said defendant trustees in behalf of said building company, in writing.

That the Summary Sheet attached hereto represents the total and reasonable claims of these your cross-complainants in the sum of \$69,507.83, none of which has been paid and which became due January 17, 1921.

XXXII.

That at the time of the failure of said bank and said Building Company and up to January 17, 1921, said defendant Drury was in active charge of the building operations here in issue and had been so actively in charge of the handling of said work upon said building, the ordering of extras and the making of payments upon said work and was in fact and in truth in full charge thereof, and that these your cross-complainants several times approached said Drury at the time above mentioned and also said defendant J. V. Sheldon, who from time to time acted in taking care of the work upon said building in said Drury's absence, with request for payment or compromise or adjustment of the claims herein represented, but that both of said defendants, acting in their official capacities and for themselves, stated to your cross-complainants that there was nothing to be done but to file the liens and that the company was without funds or assets and that a receiver has now been duly appointed for said building company as well as said bank because of the insolvency [160] of said concerns.

Further that for a period of a number of weeks prior to the stoppage of said work and on or about January 17, 1921, said building company and said remaining defendants, styled trustees herein, were repeatedly approached for payment, settlement or compromise of these matters and that none of them at any time suggested arbitration or evinced any ability to pay said claim, but in truth and in fact said building company was but a paper corporation and an integral part, although said fact was not then known to your cross-complainants of said banking institution.

WHEREFORE, your cross-complainants pray judgment in the sum of \$69,507.83 and \$6,000 as and for attorneys' fees, together with interest thereon at six per cent per annum from January 21, 1921, against said building company and against said individual defendants styled the trustees herein, namely Gust Lindberg, Chas Drury, G. G. Williamson, Dean Johnson, J. V. Sheldon, Frank M. Lanborn and Ole S. Larson and against said G. Wallace Simpson and said M. Webber, and for a decree primarily foreclosing said judgment against said property herein described and for a judgment by way of deficiency over against said individual defendants styled the trustees herein and just above mentioned and said individual defendants G. Wallace and M. Webber.

Further that said decree recites that the same and the whole of said judgment amount as prayed for be adjudged a first and valid lien against the lands and premises hereinbefore described. Further your

cross-complainants pray that said lands and premises and the building thereon situated be adjudged and decreed to be sold in satisfaction of the amount so found due to your cross-complainants according to law and the practice of this court, and that the proceeds of such sale be applied in payment of the costs of these [161] proceedings and sale and your said cross-complainants' claim amounting to \$69,-507.83 and \$6,000 as and for attorneys' fees, together with interest thereon at six per cent per annum from January 21, 1921, as hereinbefore specified.

Further your cross-complainants pray that said plaintiff and the remaining defendants and all persons claiming under them or either of them subsequent to the filing and recording of your cross-complainants' liens in the office of the Auditor of Pierce County, Washington, either as purchasers or encumbrancers, lienors or otherwise, may be barred and foreclosed of all right, claim or equity of redemption in the said premises and every part thereof. That your cross-complainants or any other parties to this suit may become a purchaser at said sale, and that the officer executing the sale shall execute and deliver the necessary conveyances to the purchaser or purchasers, and that said purchaser or purchasers at said sale may be let into the possession of said premises.

That your cross-complainants may have such other and further relief in the premises as may be just and equitable and as your Honor may deem just.

May it please your Honor to grant to your cross-complainants writs of subpoena, to be directed to the plaintiff and to the remaining defendants,

therein and thereby commanding them and each of them at a certain time and under a certain penalty therein to be named to be and appear before your Honor in this Honorable Court, then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to stand to and abide and perform such other and further orders or decrees as to your Honor shall deem meet.

FLICK & PAUL,

Attorneys for Anna Davis and R. T. Davis, Jr., as
Executors of the Estate of R. T. Davis, Deceased, R. T. Davis et al., Copartners Doing
Business Under the Name and Style of Tacoma Millwork Supply Co. [162]

United States of America,
Western District of Washington,
Southern Division,—ss.

R. T. Davis, Jr., being duly sworn, deposes and says: That he is one of the copartners of the Tacoma Millwork Supply Company and acting agent of the remaining copartners; that he has read the foregoing answer and amended cross-complaint, knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes the same to be true.

R. T. DAVIS, Jr.

Subscribed and sworn to before me this 7th day of April, 1921.

[Seal]

FRANK C. NEAL,

Notary Public in and for the State of Washington,
Residing at Tacoma. [163]

Exhibit "A-1."

Sold to:

SCANDINAVIAN-AMERICAN BANK BUILDING CO., CITY.

All material MAHOGANY except where specified differently.

Key:

C. W.—Complete in Warehouse.

C. F.—Complete in Factory.

C. W.	18000	lft. mahogany base	$\frac{5}{8} \times 7\frac{3}{4}$	@ .50	9000.
No.	18000	"	base mold	$\frac{3}{4} \times 2$	
Claim	18000	"	base shoe	$\frac{3}{8} \times 1\frac{5}{8}$	
C. W.	1000	pes. 7-8 door casing	$13/16 \times 4\frac{1}{2}$		
C. W.	800	" 9-0	" " " "		
C. W.	900	" 4-0	" " " "		
	19600	Lin. ft.	@ .40		7840.
C. F.	900	pes. 7-3 door stops	$\frac{3}{4} \times 2$		
C. F.	650	" 3-4	" " " "		
C. F.	400	" 1-5	" " " "		
	10600	Lin. ft.	@ .20		2120.
C. F.	400	pes. 8-10 Door Jambs	$1\frac{7}{16} \times 5\frac{5}{8}$ net		
C. F.	500	" 7-4	" " " "		
C. F.	450	" 3-4	" " " "		
	9400	Lin. ft.	@ .50		4700.
C. F.	200	pes. 3-4 mahogany trans. bar	$1\frac{13}{16} \times \frac{5}{8}$		
		@ 2.25 ea.			450.
C. F.	322	pes. 10-5 window head casing	$13/16 \times 4\frac{1}{2}$		
C. F.	45	" 9-10	" " " "		
C. F.	28	" 9-0	" " " "		
C. F.	39	" 5-0	" " " "		
	4828	Lin. ft.	@ .40		1931.20
C. F.	38	pes. 9-10 Window side casing	$13/16 \times 4\frac{1}{2}$		
C. F.	830	" 7-4	" " " "		
	7020	Lin. ft.	@ .40		2808.
No.					
Claim	19	pes. 9-4 mullion panelled casing made up in shop			
"	451	" 7-0	" " " " " "		
No.	322	pes. 10-6 window stools	$1\frac{1}{8}$		
Claim	45	" 9-11	" " "		
No.	28	" 9-0	" " "		
Claim	39	" 5-2	" " "		

C. W.	322	"	10-6 window apron	$\frac{3}{4}$ x $3\frac{1}{2}$	
C. W.	45	"	9-11	" " "	
C. W.	28	"	9-0	" " "	
C. W.	39	"	5-2	" " "	
			4828 Lin. ft. @ .25.....		1207.
C. F.	352	pcs.	11-0 cove mold	$\frac{1}{2}$ x $\frac{5}{8}$	
C. F.	45	"	10-0	" " "	
C. F.	28	"	9-0	" " "	
C. F.	39	"	5-2	" " "	
			5160 Lin. ft. @ .05.....		258.
C. F.	38	pcs.	9-4 back casing	$\frac{3}{4}$ x $2\frac{3}{8}$	
C. F.	830	"	6-10	" " "	
			6190 Lin. ft. @ .18.....		1114.20
No.					
Claim	38	pcs.	9-4 sub-jambs	$\frac{3}{4}$ x	
"	830	"	6-10	" " "	
[164]					
No.	322	pcs.	9-8 head sub-jambs		
Claim	45	"	9-2	" " "	
No.	28	"	8-0	" " "	
Claim	39	"	4-4	" " "	
C. F.	76	pcs.	9-2 window stops—hollow back	$\frac{5}{8}$ x 2	
C. F.	780	"	6-10	" " " " "	
C. F.	138	"	2-4	" " " " "	
C. F.	39	"	4-0	" " " " "	
C. F.	700	"	4-6	" " " " "	
C. F.	44	"	3-8	" " " " "	
			10466 Lin. ft. @ .18.....		1883.88
C. F.	8	"	10-5 window head casing	$\frac{3}{4}$ x $4\frac{1}{2}$ fir	
C. F.	3	"	9-10	" " " " "	
C. F.	20	"	7-4 window side casing	$\frac{3}{4}$ x $4\frac{1}{2}$ fir	
C. F.	4	"	10-0	" " " " "	
No.	11	"	7-0 window mullion casing	$\frac{3}{4}$ x 4 made up fir	
Claim	3	"	9-11 window stool	$1\frac{1}{8}$ fir	
No.	6	"	10-6	" " " "	
Claim	2	"	5-6	" " " "	
C. W.	3	pcs.	10-0 window apron	$\frac{3}{4}$ x $3\frac{1}{2}$ fir	
C. W.	6	"	10-6 window apron	$\frac{3}{4}$ x $3\frac{1}{2}$ "	
C. W.	2	"	5-6	" " " "	
			114 Lin. ft. @ .08.....		9.12
C. W.	20	pcs.	6-10 Black casing	fir	
			140 Lin. ft. @ .08.....		11.20
No.	20	pcs.	6-10 sub-jambs	fir	

Claim	11	"	9-8 head sub-jambs fir	
C. F.	22	"	6-10 window stops $\frac{5}{8}$ x 2 fir	
C. F.	11	"	4-6 " " " " "	
			209 Lin. ft. @ .08.....	16.72

WOOD FRAMES FOR BANK BUILDING. FIR

In building	16	Mullion frames	9-4 $\frac{3}{4}$ x 9-3 $\frac{1}{4}$	OSM of frame	
691 Openings	3	" "	8-10 x 9-3 $\frac{1}{4}$	" "	
In Warehouses	36	" "	8-10 x 7-0 $\frac{1}{4}$	" "	
238 Openings	22	" "	7-9 $\frac{1}{2}$ x 7-0 $\frac{1}{4}$	" "	
929 "	227	" "	9-4 $\frac{3}{4}$ x 7-0 $\frac{1}{4}$	" "	
" "	2	" "	9-4 $\frac{3}{4}$ x 7-0 $\frac{1}{4}$	with door	
		opening			
" "	60	Triple frames	9-4 $\frac{3}{4}$ x 7-0 $\frac{1}{4}$	OSM of frame	
" "	9	" "	8-10 x 7-0 $\frac{1}{4}$	" "	
" "	26	Mullion frames	9-4 $\frac{3}{4}$ x 7-0 $\frac{1}{4}$	" "	
" "	6	Triple frames	7-9 $\frac{1}{2}$ x 7-0 $\frac{1}{4}$	" "	
" "	39	Single frames	4-0 $\frac{1}{4}$ x 7-0 $\frac{1}{4}$	" "	
446 frames making 929 Openings @ \$10.00 ea.....					9290.00

WINDOWS. FIR

All complete	32	windows	4-3 x 8-10 $\frac{7}{8}$	
977 pcs in	6	"	3-11 $\frac{5}{8}$ x 8-10 $\frac{7}{8}$	
Warehouse	452	"	4-3 x 6-7 $\frac{7}{8}$	
nearly complete	72	"	3-11 $\frac{5}{8}$ x 6-7 $\frac{7}{8}$	
847 pcs. in factory	44	"	3-5 $\frac{3}{8}$ x 6-7 $\frac{7}{8}$	
In factory	75	"	3-7 x 6-7 $\frac{7}{8}$	

[165]

All complete	120	windows	2-1 $\frac{3}{4}$ x 6-7 $\frac{7}{8}$	
977 pcs. in	18	"	22 $\frac{3}{8}$ x 6-7 $\frac{7}{8}$	
Warehouse	12	"	16 $\frac{1}{8}$ x 6-7 $\frac{7}{8}$	
Nearly complete	52	"	4-3 x 6-7 $\frac{7}{8}$	
847 pcs. in	39	"	3-9 x 6-7 $\frac{7}{8}$	

Factory—

in factory.

924 Windows or 1824 pcs. of sash @ \$3.50 ea.....	6384.00
---	---------

DOORS. MAHOGANY

Nearly	200	doors	3-0 x 7-0 x 2 mahogany	1 light glass	
Complete	@	\$20.00			4000.00
in factory	250	"	3-0 x 7-0 x 2	" 1 panel	
	@	\$20.00			5000.00
	200	mahogany transom sash	3-0 x 1-3 x 1 $\frac{3}{4}$		
	1	light @ \$2.50.....			500.00

\$58555.92

NOTE: Prices set opposite last three items are for cost as far as completed only.

[166]

Exhibit "B-1."

Sold to:

SCANDINAVIAN-AMERICAN BANK BUILDING COMPANY, CITY.

C. F. 400 pes. 8-11 Common fir door bucks, 2½ x 5½

500 " 7-4 " " " " " "

450 " 3-10 " " " " " "

Above material as per contract..... 1266.00

[167]

Exhibit "C-1."

Sold to:

SCANDINAVIAN-AMERICAN BANK BUILDING COMPANY, CITY.

All material to be mahogany unless otherwise specified.

BANKING ROOM FRAMES.

All complete	2	frames	8-4½ x 19-3	OSM	trans.	4-6¾	fir
11 in Bldg.	4	"	9-3 x 19-3	"	"	"	"
9 in factory	2	"	7-9½ x 19-3	"	"	"	"
" "	4	"	8-1 x 19-3	"	"	"	"
" "	2	"	7-5¾ x 19-2	"	"	"	"
" "	1	"	7-6¼ x 19-3	"	"	"	"
" "	2	transom frames	9-3 x 5-0	sash	4-6¾	high	fir
" "	2	"	8-4½ x 5-0	"	"	"	"
" "	1	triple	8-4½ x 6-3	sash	2-6¾ x 5-9½	fir	
" "	1	"	8-4½ x 5-6	"	2-6¾ x 5-0½	"	

BANKING ROOM WINDOW TRIM.

C. F. 30 pes.	16-0	inside	stops	15/16 x 2½	mahogany		
C. F. 36	"	5-0	"	"	"	"	"
C. F. 6	"	6-6	"	"	"	"	"
C. F. 6	"	5-6	"	"	"	"	"
C. F. 27	"	8-6	"	"	"	"	"
C. F. 19	"	9-6	"	"	"	"	"
C. F. 12	"	7-9	"	"	"	"	"
C. F. 8	"	8-0	"	"	"	"	"
C. F. 30 pes.	20-0	jamb	casing	1 1/16 x 1 1/16	S4S	mahogany	
C. F. 6	"	5-0	"	"	"	"	"
C. F. 2	"	5-6	"	"	"	"	"
C. F. 2	"	6-6	"	"	"	"	"
C. F. 5	"	8-9	"	"	"	"	"
C. F. 4	"	8-6	"	"	"	"	"
C. F. 2	"	8-2	"	"	"	"	"
C. F. 3	"	8-0	"	"	"	"	"
C. F. 6	"	9-8	"	"	"	"	"

C. F.	2	pes.	8-0	1 1/16 x 3 9/16	S4S	mahogany		
C. F.	4	"	8-3	"	"	"	"	
C. F.	2	"	8-6	"	"	"	"	
C. F.	3	"	7-9	"	"	"	"	
C. F.	4	"	9-6	"	"	"	"	
C. F.	5	pes.	8-9	1 1/16 x 2	S4S	mahogany		
C. F.	4	"	8-6	"	"	"	"	
C. F.	2	"	8-2	"	"	"	"	
C. F.	3	"	7-10	"	"	"	"	
C. F.	6	"	9-8	"	"	"	"	
C. F.	30	pes.	20-0	mahogany	bed	mold	1 11/16 x 1 3/4	
C. F.	6	"	5-0	"	"	"	"	"
C. F.	2	"	5-6	"	"	"	"	"
C. F.	2	"	6-6	"	"	"	"	"
C. F.	10	"	8-9	"	"	"	"	"
C. F.	8	"	8-6	"	"	"	"	"
C. F.	4	"	8-4	"	"	"	"	"
C. F.	6	"	8-0	"	"	"	"	"
C. F.	3	"	10-0	"	"	"	"	"

Material as above and on preceding sheet..... 1957.00

Banking rooms—

[168]

Exhibit "D-1."

Sold to:

SCANDINAVIAN AMERICAN BANK BUILDING COMPANY, CITY.

LABOR CONTRACT ON BUILDING.

Mitering, gluing up, smoothing off and making rabbet for base on 900 sides door casing @ \$2.00.....	1800.00
Mitering up, gluing and smoothing off 39 sides window casing @ \$2.00	78.00
Mitering and smoothing off 405 sides window casing @ \$2.00	810.00
Fitting 1848 pieces of sash into frames and preparing for hardware @ \$1.50.....	2772.00
Squaring ends of 180000 feet of base, and working tongue on ends @ \$.02¢ per foot.....	360.00
Work on 446 aprons, returning molding on ends and bring- ing to exact lengths @ \$.50 each.....	223.00

6043.00

[169]

Exhibit "E-1."

Sold to:

SCANDINAVIAN AMERICAN BUILDING COMPANY, CITY.

EXTRA: Not on contract.

80 pes. scaffold bucks.....\$200.00
[170]

Exhibit "F-1."

Sold to:

SCANDINAVIAN AMERICAN BANK BUILDING COMPANY, CITY.

EXTRA: Not on contract.

40 pes. wedges 4" x 6" x 18"\$8.00
[171]

Exhibit "G-1."

Sold to:

SCANDINAVIAN AMERICAN BUILDING COMPANY, CITY.

To premium on Contractor's surety Bonds to be paid for by

Owner as per agreement.....\$718.41

[172]

SUMMARY.

Exhibit "A"	58555.92
" "B"	1266.00
" "C"	1957.00
" "D"	6043.00
" "E"	200.00
" "F"	8.00
" "G"	718.41
	<hr/>
	68748.33
Credits May 14, 1920	\$ 8.00
" Aug. 16, 1920	5100.00
" Sept. 18, 1920	1132.50
	<hr/>
	6240.50
Total credits.....	6240.50
Balance due	62,507.83
Profit entitled to on balance of "Labor Contract".....	6,000.00
Profit entitled to on balance of "Main Contract".....	1,000.00
	<hr/>
	62,507.83

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 5, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [173]

Reply of McClintic-Marshall Company to Cross-complaint of Tacoma Millwork Supply Company.

Comes now McClintic-Marshall Company, a corporation, complainant, and for its reply to the cross-complaint of Tacoma Millwork Supply Company contained in its answer filed herein, says:

I.

For reply to the 12th paragraph of said cross-complaint this complainant admits that on the 28th day of February, 1920, the cross-complainant Tacoma Millwork Supply Company entered into certain written contracts with the Scandinavian-American Building Company, which contracts are attached to the original answer and cross-complaint of cross-complainant in this action, but denies all other matters and things contained in said paragraph.

II.

For reply to the 13th paragraph of said cross-complaint this complainant says it is without knowledge or information sufficient to form a belief as to the matters and things therein alleged and it therefore denies the same, except that it admits that on the 19th of January, 1921, the cross-complainant filed in the auditor's office of Pierce County, Washington, its claim of lien upon said premises, and that on April 7, 1921, it filed its amended lien. [174]

III.

For reply to the 14th paragraph of said cross-

complaint this complainant says that it is without knowledge or information sufficient to form a belief as to the matters and things therein stated and therefore denies the same.

IV.

For reply to the 15th paragraph of said cross-complaint this complainant says that it is without knowledge or information sufficient to form a belief as to whether or not on the 17th day of January, 1921, there was due to said cross-complainant from the Scandinavian-American Building Company the sum of \$69,507.83, or any other sum, and it therefore denies the allegations contained in said paragraph, and the whole thereof, except it admits that on said date the cross-complainant filed in the office of the auditor of Pierce County, Washington, its claim of lien against the lands and premises described therein and that on April 7, 1921, it filed its amended claim of lien against said lands and premises.

V.

For reply to the 16th paragraph of said cross-complaint this complainant says that it is without knowledge or information sufficient to form a belief as to the matters and things therein alleged and it therefore denies the same and the whole and every part thereof, except that it admits that on the date mentioned the cross-complainant filed a claim of lien in the office of the auditor of Pierce County, Washington, against the lands and premises therein described, and that on April 7, 1921, it filed its amended lien as alleged in said paragraph.

VI.

For reply to the 17th paragraph of said cross-complaint [175] this complainant denies that the Scandinavian-American Building Company was insolvent at the date of signing contracts mentioned in said cross-complaint but admits that the said Scandinavian-American Building Company is now insolvent.

VII.

For reply to the 24th paragraph of said cross-complaint this complainant says that it is without knowledge or information sufficient to form a belief as to the matters and things therein alleged and therefore denies the same except that this complainant admits that after the execution of the mortgage from the Scandinavian-American Building Company to the said Simpson in the sum of \$600,000.00, who, as this complainant believes and therefore alleges was acting for and on behalf of the Metropolitan Life Insurance Company, the said Scandinavian-American Building Company, without consideration, caused said Simpson to assign said mortgage to said bank, but the assignment was not recorded until on or about the — day of —, 1920.

VIII.

For reply to the 25th and 26th paragraphs of said cross-complaint, this complainant says that it has no knowledge or information sufficient to form a belief as to the matters and things therein alleged and therefore denies the same, the whole and every part thereof.

IX.

For reply to the 27th paragraph of said cross-complaint this complainant denies that at the time the contract between the Scandinavian-American Building Company and the cross-complainant were signed the Scandinavian-American Bank or the Building Company were insolvent. As to the other [176] matters alleged in said paragraph, this complainant says it is without knowledge or information sufficient to form a belief and therefore denies the same.

X.

For reply to the 28th paragraph of said cross-complaint this complainant says that it is without knowledge or information sufficient to form a belief and therefore denies the allegations contained therein.

XI.

For reply to paragraph 19, so far as the same relates to the lien or claim of this complainant, it denies the same, the whole and every part thereof, and denies that there is chargeable against it the sum of \$60,000.00 or any other sum for failure to deliver steel within the contract time or for any other reason, and alleges and avers the fact to be that it fully and completely performed its contract with the Scandinavian-American Building Company, which contract is set out as an exhibit to the bill of complaint filed herein.

XII.

For reply to the 21st paragraph of said cross-complaint this complainant says it has no knowl-

edge or information sufficient to form a belief as to the matters and things therein alleged and it therefore denies the same.

WHEREFORE, having fully replied to said cross-complaint this complainant prays for a decree in accordance with the prayer of its amended and supplemental bill.

E. M. HAYDEN,

MAURICE A. LANGHORNE,

F. D. METZGER,

Solicitors for Complainant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 25, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [177]

Answer of Scandinavian-American Building Company and F. P. Haskell, Jr., as Receiver, to Cross-complaint of Tacoma Millwork Supply Company.

The defendants, Scandinavian-American Building Company, a corporation, and F. P. Haskell, Jr., as Receiver of the Scandinavian-American Building Company, in answer to the amended or supplemental cross-bill of complaint of the defendants, Ann Davis and R. T. Davis, Jr., et al., copartners doing business as Tacoma Millwork & Supply Company.

I.

Answering paragraph 12 of said cross-complaint these defendants allege that the original cross-

complaint therein referred to has never been served upon the defendants in this action and they therefore object to any portion of such alleged original cross-complaint or to any exhibit which may be attached thereto being by reference incorporated into the said amended cross-bill of complaint.

II.

Answering paragraph XIII of said cross-complaint these defendants deny that the said cross-complainants manufactured or [178] delivered manufactured material especially designed to use in the building therein described of the total value of \$60,512.92, or of any other value whatsoever, and they deny that the said cross-complainant would have made a profit of \$1,000.00 had they completed their said contract, or that the said cross-complainant would have made any profit whatsoever and they deny that contemplated profits are lienable under the laws of the State of Washington, and they allege that they have not knowledge or information sufficient to form a belief as to whether or not the said cross-complainants filed any lien in form and substance as required by the statutes of the State of Washington, and therefore deny the same.

III.

Answering paragraph XIV of the said cross-complaint, these defendants deny that the material manufactured by the said cross-complainants is usable solely in the building therein mentioned,

but allege that the same is the usual and ordinary building material of like character.

IV.

Answering paragraph XV of the said cross-complaint, these defendants deny that the sum of \$69,507.83, or any other sum whatsoever was due to the said cross-complainants from the said Scandinavian-American Building Company on January 17, 1921, or at any other time whatsoever and deny that the said Scandinavian-American Building Company had theretofore failed and refused to pay any amount due from it whatsoever, and allege that they have not knowledge or information sufficient to form a belief as to whether the lien filed as therein mentioned was in form and in substance in compliance with the laws and statutes of the State of Washington, and therefore they deny the same.

V.

Answering paragraph XVI these defendants deny that the [179] contracts therein mentioned were entered into contemporaneously or that any contract formed a part of the consideration for any other contract, but allege that the mutual promises of the parties thereto formed the only consideration for the said contract, and deny that the said cross-complainant would have made the sum of \$6,000.00 and profits as therein set forth, or any other sum whatsoever, and deny that contemplated profits are alienable under the laws of the State of Washington, and allege that they have not knowledge or information sufficient to form a belief as to whether or not the said defendants filed a mechanic's lien

as therein stated, or whether or not the said lien, if filed complied with the laws and statutes of the State of Washington, and they therefore deny the same; and they deny that the said cross-complainants are entitled to any sum or sums whatsoever for their labor in assembling any manufactured profits, but they allege that such work and labor was done in accordance with the terms of the written contract in the said cross-complaint mentioned, and allege that they have not knowledge or information sufficient to form a belief as to whether or not the said cross-complainant filed any lien as therein mentioned, and as to whether or not the said lien, if filed, conformed with the laws and statutes of the State of Washington, and therefore they deny the same, and they particularly deny that the cross-complainants are entitled to any lien for contemplated profits under the laws and statutes of the State of Washington.

VI.

Answering paragraph XVII of said cross-complaint, these defendants deny that the said Scandinavian-American Building Company was insolvent when the said contracts were made.

VII.

Answering paragraph XVIII of the said cross-complaint, these defendants deny that the sum of \$6,000.00 is a reasonable sum to be allowed the said cross-complainants as attorney's fees [180] herein, and deny that the said cross-complainants are entitled to any lien whatsoever under the laws

of the State of Washington or entitled to any attorney's fees herein at all.

VIII.

Answering paragraph XX of the said cross-complaint these defendants deny that the Board of Directors of the Scandinavian-American Bank of Tacoma and the Scandinavian-American Building Company are now or ever were identical.

IX.

Answering paragraph XXI of the said cross-complaint these defendants deny that the said Webber therein mentioned ever agreed to furnish any money whatsoever to any of the parties hereto upon any mortgage or otherwise.

X.

Answering paragraph XXII of said cross-complaint these defendants deny that any person or persons whomsoever unlawfully conspired to advance money to the Scandinavian-American Building Company for any purpose whatsoever and deny that any agreement of that kind, if made, would be unlawful, and deny that any person or persons whatsoever conspired to keep any facts of any kind, name or nature from the State Banking department or from the said cross-complainant or any other person.

XI.

These defendants deny that any person or persons whatsoever conspired to acquire the stock of the Scandinavian-American Building Company in any unlawful manner, or that any such persons unlawfully kept any such agreement secret from the pub-

lic, the State Banking Department, the cross-complainants, or any other persons whatsoever, for any purpose whatsoever.

XII.

Answering paragraph XXIV these defendants deny that any person or persons whomsoever by any unlawful conspiracy or otherwise [181] represented to the said cross-complainants any fact or facts whatsoever which were not in fact true, and they particularly deny that the said Metropolitan Life Insurance Company had not given its assurance that it would make the loan of \$600,000 to be evidenced by a mortgage upon the said building, and that the said mortgage was transferred to the said bank without consideration.

XIII.

Answering paragraph XXIII these defendants deny that the said cross-complainants were induced to sign the said contract by misrepresentations or representations of any kind whatsoever, or otherwise, and they particularly deny that any representations made to the said cross-complainants were false, or were made pursuant to any conspiracy or otherwise.

XIV.

Answering paragraph XXVI of this cross-complaint these defendants allege that they have not knowledge or information sufficient to form a belief as to the truth or falsity of the allegations therein contained, and therefore they deny the same and they particularly deny that any special arrangements were entered into with any person or persons

whomsoever, and allege that if any such special arrangement were made with any person or persons whomsoever, such arrangement would not prejudice the rights of the said cross-complainants in any manner whatsoever.

XV.

Answering paragraph XXVII of the said cross-complaint these defendants deny that the said bank and the said building company were insolvent at the time of said transaction and they deny that any person or persons whomsoever knew that the said bank or the said building company were insolvent, and they deny that any person or persons whomsoever knew that any bidders or contractors whomsoever would not yield to the conditions imposed [182] by the said contract and they deny that the moneys at the bank in this instance or in any other instance was against public policy or the same was in the face of the specific statutes of the State of Washington, and deny that any person or persons whomsoever fraudulently kept any matters or things secret from the said cross-complainants for the purpose of inducing them to manufacture or deliver materials or otherwise, and deny that any person or persons whomsoever fraudulently obtained the assignment of the said \$600,000.00 mortgage to the said bank.

XVI.

Answering paragraph XXVIII of the said cross-complaint these defendants deny that the said cross-complainant signed the said contract in reliance upon any statement or statements whatsoever, ex-

cept those contained in the written contract, and deny that the cross-complainant would have refused to waive their lien as provided in the said contract or to acquiesce in any arbitration of their claim, or would have ceased to manufacture and deliver materials under the said contract had the cross-complainant known any fact or facts which are true.

XVII.

Answering paragraph XXXI of the said cross-complaint the defendants allege that they have not knowledge or information sufficient to form a belief as to whether or not goods of any value whatsoever have been manufactured and placed in storage or are still at the factory of the said cross-complainant, and therefore they deny the same, and they expressly deny that any of the material so manufactured and placed in storage or kept at the factory of the cross-complainant is specially constructed for the building mentioned in said cross-complaint and cannot be used except therein, but allege that the said material is usable in any similar building and they deny that the said material is of any special design and they particularly deny that the said cross-complainants have a claim for the sum of \$69,507.83, or any other [183] sum whatsoever, and they object to the incorporation into the said cross-complaint of any exhibit or exhibits which have not been served upon them as required by law.

XVIII.

Answering paragraph XXXII of the said cross-complaint the defendants allege that they have not

knowledge or information sufficient to form a belief as to the truth or falsity of the allegations therein contained, and they therefore deny the same, and they especially deny that at any time prior to January 17th, 1921, the said cross-complainant offered to submit any matters of difference between themselves and the said building company to arbitration, and that the said building company at any time prior thereto, failed, neglected or refused to pay to the said cross-complainants any sums justly due to them under the terms of the contract.

As a first defense to the cross-bill of complaint of the defendants, R. T. Davis, Jr., et al., copartners doing business as Tacoma Millwork & Supply Company, these defendants allege:

I.

That the said cross-complainants entered into written contracts with the said Scandinavian-American Building Company, wherein and whereby they expressly agreed to submit all matters of differences between themselves and the said building company to arbitration, that the said defendants and cross-complainants have no lien under the laws of the State of Washington for any work done or for any material furnished under the said contract, by reason thereof.

As a second defense to the cross-bill of complaint of the defendants, R. T. Davis, Jr., et al., copartners doing business as Tacoma Millwork & Supply Company, these defendants allege:

I.

That the said cross-complainants have, with knowl-

edge of the facts, filed their lines as set forth in their cross-bill of [184] complaint herein, and have included therein nonlienable items and have filed the same for amounts greatly in excess of the amount due to them in truth and in equity, and that by reason thereof, the said cross-complainants have thereby forfeited their right to any lien and their right to any equity at the hands of this Court.

As a third defense to said cross-bill of complaint, these defendants allege:

I.

That notwithstanding that the said cross-complainant now claims that there is due to it from the said Scandinavian-American Building Company the sum of \$16,507.83, the said cross-complainant has filed four liens encumbering the title to the said property and claiming a total amount due them of \$161,566.24.

As a fourth defense to the said cross-bill of complaint, these defendants allege:

I.

That the contract made between them, the said cross-complainants, and the said Scandinavian-American Building Company, by their terms provide that the said cross-complainant thereby waives any and all right to any materialmen's lien or lien against the said premises described in the said cross-complaint, and thereby expressly agreed not to file any claim or lien whatsoever against the said premises, and the said cross-complainants have thereby estopped themselves from filing such lien.

As a fifth defense to the said cross-bill of complaint, these defendants allege:

I.

That the written contracts entered into between the said cross-complainant and the said Scandinavian-American Building Company by their terms provide that all negotiations and agreements, oral and written, prior to the said agreement, are merged therein and that there are no understandings and agreements, verbal, written or otherwise, between the parties thereto except [185] as set forth in said written agreement, and that the said written agreement contained no representation whatsoever as to the finances of the said building company, the mortgages referred to in said cross-complaint, the commitment of the — referred to in said cross-complaint of the Metropolitan Life Insurance Company, or any of the matters or things therein set forth.

WHEREFORE defendants pray that the prayer of the cross-complainant in the cross-bill of complaint herein be in all respects denied.

F. D. OAKLEY,

KELLY & MacMAHON,

Attorneys for Defendants.

Copy received June 15, 1921.

FLICK and PAUL,

Attys. for Ann Davis, etc., et al.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 5, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [186]

**Answer and Cross-Complaint of Washington Brick,
Lime & Sewer Pipe Company to Amended and
Supplemental Bill of Complaint.**

Now comes the Washington Brick Lime & Sewer Pipe Company, a corporation organized under the laws of the State of Washington, one of the defendants in the above-entitled action, and answers the amended and supplemental bill of complaint herein as follows, to wit:

I.

This defendant denies knowledge as to the matters and things alleged in paragraphs XIV, XV, XVI and XVII of said amended and supplemental bill of complaint and therefore denies the same.

II.

This defendant denies knowledge as to the matters and things alleged in paragraph XVIII of said amended and supplemental bill of complaint except that it admits it has a right and interest in and to, and a lien upon said premises referred to in said complaint, but denies that said right, interest and lien is junior, subsequent and inferior to the lien of the complainant.

III.

This defendant denies each and every allegation, matter and thing contained in paragraph XIX of said amended and supplemental bill of complaint.

IV.

This defendant denies knowledge as to the matters and things contained in paragraph XX of said

amended and supplemental bill of complaint and therefore denies the same.

And for its cross-complaint and counterclaim against the complainant, and for cause of action against the Scandinavian-American Building Company, a corporation, and Forbes P. Haskell, its Receiver; Scandinavian-American Bank of Tacoma, a corporation; John P. Duke, as Supervisor of Banking of the State of Washington; and Forbes P. Haskell, as Assistant Supervisor of Banking of the State of Washington in charge of the liquidation of said bank, this [188] defendant alleges and shows:

I.

That the Washington Brick Lime & Sewer Pipe Company is now and at all times hereinafter mentioned, has been a corporation organized and existing under the laws of the State of Washington; that its annual license fee last due has been paid; and that it is a citizen of the State of Washington with its principal place of business in the City of Spokane, Washington.

II.

That the Scandinavian-American Bank of Tacoma and the Scandinavian-American Building Company are corporations, duly organized and existing under the laws of the State of Washington; are citizens of said State and are residents of the Southern Division of the Western District of the State of Washington; that John P. Duke is the regularly appointed, qualified and acting supervisor of banking of the State of Washington, and

successor in office of Claude P. Hay, named in the amended and supplemental bill of complaint as commissioner of banking for the State of Washington; that Forbes P. Haskell is the regularly appointed, qualified and acting assistant supervisor of banking of the State of Washington, and in charge of the liquidation of the affairs of the said Scandinavian-American Bank of Tacoma; that Forbes P. Haskell is also the regularly appointed, qualified and acting receiver of the Scandinavian-American Building Company, and that leave to make the said Forbes P. Haskell, as receiver of the Scandinavian-American Building Company, a party to this action, has been heretofore entered by this court.

III.

On information and belief, this defendant alleges that the defendants Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, constitute a copartnership, doing [189] business in Tacoma, Washington, under the name and style of Tacoma Millwork Supply Company, and all of said named defendants, with the exception of Hattie Davis Tennant, are citizens of the State of Washington, and the said Hattie Davis Tennant is a citizen of the State of California.

IV.

On information and belief, this defendant alleges that G. Wallace Simpson is a citizen of the State

of Missouri, and that the complainant, McClintic-Marshall Company, is a corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, and a citizen of said state.

V.

On information and belief, this defendant alleges that the defendants, Savage-Scofield Company; Puget Sound Iron & Steel Works; E. E. Davis & Company; Henry Mohr Hardware Company, Inc.; Hunt & Mottet; Edward Miller Cornice & Roofing Company; Far West Clay Company; St. Paul & Tacoma Lumber Company; United States Machine & Engineering Company; Colby Star Manufacturing Company; Tacoma Shipbuilding Company, and Ben Olson Company, are all corporations organized and existing under the laws of the State of Washington, and citizens of said State.

VI.

On information and belief this defendant alleges that the defendant, Otis Elevator Company is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and a citizen of said State, but has been admitted to do business in the State of Washington by virtue of having complied with the laws of the State of Washington, relative to foreign corporations.

VII.

On information and belief, this defendant alleges that [190] the defendants, H. C. Greene, doing business as H. C. Greene Iron Works; J. D. Mullins, doing business as J. D. Mullins Bros.; S. O. Matthews and Frank L. Johns, a copartnership, doing

business under the name of City Lumber Agency; Carl Gebbers and Fred S. Haines, copartners, doing business under the firm name and style of Ajax Electric Company; S. J. Pritchard and C. H. Graves, copartners, doing business as P. & G. Lumber Company; Morris Kleiner, doing business as Liberty Lumber & Fuel Company; J. A. Soderberg, doing business as West Coast Monumental Company; Theodore Hedlund, doing business as the Atlas Paint Company, and Robert M. Davis and Frank C. Neal, copartners, doing business under the firm name and style of Davis & Neal, are all citizens of the State of Washington, and residents of the Southern Division of the Western District of Washington.

VIII.

On information and belief this defendant alleges that the defendants, F. W. Madsen; Gustaf Jonasson; N. A. Hanson; A. J. Van Buskirk; C. W. Crouse; F. L. Swain; D. A. Trolson; Fred Gustafson; E. Scheibal; Paul Scheibal; F. J. Kazda; W. Donnellan; P. Hagstrom; Arthur Purvis; Roy Farnsworth; C. B. Dustin; L. J. Pettifer; Charles Bond; L. H. Broten; W. Canaday; L. R. Lilly; F. McNair; Dave Shields; Ed. Lindberg; Joe Tikalsky; F. Mente; C. Gustafson; George Larson; F. Marcellino; M. Swanson; William Griswold; C. E. Olson; C. I. Hill; Emil Johnson; C. Peterson; Earl Whitford; F. A. Fetterly; Thomas S. Short; Sherman Wells; Carl J. Gerringer; George Gerringer; F. R. Schoen; A. W. Anfang; C. H. Boedecker; William L. Owen; F. N. Bergren; F. H. Godfrey

and W. E. Morris, are each and every one of them citizens of the State of Washington, and residents of the Southern Division of the Western District of Washington. [191]

IX.

Further, defendant shows that the matter and amount in the above-entitled action exceed, exclusive of costs, the sum of \$3,000.00.

X.

That on and prior to November 1st, 1919, the Scandinavian-American Bank of Tacoma, was the owner in fee of Lots Eleven (11) and Twelve (12) in Block one thousand and three (1003) as the same are shown and designated on a certain plat entitled "Map of New Tacoma, W. R.," filed in the Auditor's office of Pierce County, Washington, February 3d, 1875, and was occupying said building and conducting therein its banking business.

That said bank, desiring to enlarge its banking facilities and to provide more extensive and elaborate quarters, employed one Frederick Webber, an architect of Philadelphia, Pa., to prepare plans and drawings of a proposed building to be erected on said real estate, and subsequently said architect prepared and delivered to said bank, plans and drawings thereof.

XI.

That after receiving said plans and drawings, and in order to avoid the appearance to the general public that said bank was using its resources in the building of said structure, it caused certain of its directors and stockholders, to wit: J. E. Chil-

berg, and Gustav Lindberg, to execute articles of incorporation of the Scandinavian-American Building Company, with a capital stock of Two Hundred Thousand Dollars (\$200,000.00), designating as trustees thereof, Chilberg, Larson, Lindeberg, Lindberg, Drury, James R. Thompson and George E. Williamson, who were also all of the directors of said bank, to serve for the first six months, and said bank subscribed for all of the capital stock of said corporation, other than a nominal amount held by said trustees, in order to qualify them as trustees. [192]

That on or about February 9th, 1920, said bank purchased from Charles Drury, one of its directors, and his wife, Lot Ten (10) in said block one thousand and three (1003), adjoining said premises and caused the deed of conveyance thereto to be made to said building company.

XII.

Thereafter, on or about March 10th, 1920, said bank, without any consideration, although its value was in excess of One Hundred Thousand Dollars (\$100,000.00), executed and filed a deed of conveyance to said building company of Lots Eleven (11) and Twelve (12) aforesaid, and thereupon, said bank, in pursuance of its said plans and in the name of said building company, but in truth and in fact, as its agents and trustees, entered upon the construction of a sixteen-story building, which contemplated a cost and expenditure of in excess of \$1,200,000.00. And thereafter, said building operations, negotiations of contracts for materials

and work thereon and all business of every kind in connection therewith was carried on and conducted by the principal officers of the bank and all payments for materials, labor and other services were made by said bank.

XIII.

On or about March 10th, 1920, said bank, in the name of said building company, caused a mortgage on said real estate to be executed and filed, to one G. Wallace Simpson, to secure the payment of \$600,000.00, but no consideration was paid or advanced thereunder.

On or about January 21st, 1921, said bank, without any consideration therefor, procured said Simpson to execute a written assignment of said mortgage to said bank and caused said assignment to be filed in the Auditor's Office of Pierce County, Washington. That shortly thereafter, said Scandinavian-American [193] Bank of Tacoma was declared insolvent and placed in charge of Forbes P. Haskell, as Deputy Bank Commissioner of the State of Washington, and afterwards, said Deputy Bank Commissioner procured an assignment to be executed to him of a mortgage to secure an indebtedness of Seventy Thousand Dollars (\$70,000.00), on said real estate, and now holds title thereto.

XIV.

That on or about February 28th, 1920, in the name of said building company, but in fact for said bank, a written agreement was entered into with this defendant, whereby said defendant agreed to manufacture, fabricate and furnish all of the terra

cotta for said building, according to the plans and specifications prepared by said architect, a copy of which contract is hereto attached, marked Exhibit "A," and made a part hereof.

XV.

That thereafter, pursuant to said contract, said defendant was furnished by said architect, drawings and explanations necessary to detail and illustrate said material to be manufactured and fabricated, and in accordance therewith, said defendant manufactured said material in accordance with said details and drawings, and according to the plans and specifications, and shipped a portion thereof to said company at Tacoma, to wit:

13035 cubic feet of terra cotta, which was worth, according to the terms of said contract, and the reasonable value of which was the sum of \$58,-657.50;

That in addition thereto, this defendant manufactured, in accordance with said details and drawings, and according to the plans and specifications, and had ready for shipment to the said Building Company, 5340 cubic feet of terra cotta, which, according to the contract was worth, and the reasonable value of which was \$23,309.10; [194]

That in addition thereto, it had partially manufactured, in accordance with said details and drawings, 3805 cubic feet of terra cotta, which according to the contract was worth, and the reasonable value of which was the sum of \$17,323.38;

That the total value of said material so furnished, according to the contract, and the reasonable value

thereof, was the sum of \$99,289.98, and that no part thereof has ever been paid, altho demand has been made, except the sum of \$20,000, and that there is now due and owing to this defendant, on account thereof, the sum of \$79,289.98, together with interest thereon from the 24th day of February, 1921; that the first of said material was furnished on or about September 25th, 1920, and this defendant ceased to furnish such material on or about January 13th, 1921.

XVI.

This defendant alleges that it stood ready and willing to deliver all of the balance of the material provided by said contract in accordance with the plans and specifications therefor, but defendants, Scandinavian-American Building Company, and Forbes P. Haskell, as Receiver thereof, and said Forbes P. Haskell as Assistant Supervisor of Banking of the State of Washington, in charge of the Scandinavian-American Bank of Tacoma, has declined and refused to receive and accept any more thereof.

That if said cross-complainant had been permitted to fully complete and perform the balance of said contract, it would have made and earned a profit thereon of \$5,000.00.

XVII.

This defendant further alleges that within ninety days after it ceased to furnish the said builders' materials, hereinbefore referred to, and on the 24th day of February, 1921, it filed a notice of lien in writing, claiming a lien on the said [195]

building, hereinbefore referred to, and the lots on which it is situate, as hereinbefore described, for the amount due it for the said builders' materials, and the said notice of lien was duly filed in the office of the auditor of Pierce County, Washington, duly verified by the oath of the claimant, and copy thereof is hereto attached, marked Exhibit "B," and is made a part hereof.

XVIII.

That said notice of lien claimed a lien on said building and premises hereinbefore described, for the amount due to this defendant, under and by virtue of Sections 1129, 1130 and 1134 of Remington & Ballinger's Codes and Statutes of Washington.

XIX.

That this defendant has been compelled to employ attorneys to foreclose and enforce its lien, and protect and preserve its rights and interests arising under said contract and lien; that under and by virtue of the laws of the State of Washington, and particularly under the provisions of Section 1141 of Remington and Ballinger's Codes and Statutes of Washington it is entitled to a reasonable attorneys' fee therefor, which it alleges and avers is the sum of \$10,000.

XX.

This defendant alleges that the complainant in the above-entitled action, and each of the defendants therein, whose names are set forth in full in the caption or title to this answer, claim to have a lien or judgment on the lots and premises herein-

before described, and the building thereon, or claim to have some right, title or interest in and to said premises, or some part thereof, but defendant alleges that the said lien, judgment, right, title or claim is subject, secondary and subordinate to the lien of this defendant hereinbefore set forth.

XXI.

That not waiving its lien or claims thereunder, but [196] reserving its rights thereunder, this defendant filed its duly verified claim against said Scandinavian-American Bank of Tacoma with the said John P. Duke and Forbes P. Haskell, respectively supervisor of banking and assistant supervisor of banking in charge of the liquidation of said bank, and also with Forbes P. Haskell as receiver of the Scandinavian-American Building Company, and that each of said claims has been disallowed.

WHEREFORE, defendant prays that the complainant in the above-entitled action, and each of the said defendants therein, may be required to answer the counterclaim and cross-complaint of this defendant, and set forth the nature, character and extent of their claims, demands, liens, judgments, or interests, in and to said building and premises, or any part thereof, and that upon the hearing hereof they and each of their liens, judgments, right and title in and to the said building and premises, and each of them, or any part thereof, be adjudged and decreed to be subject, secondary and subordinate to the lien of this defendant, hereinbefore set forth.

Upon the hearing hereof, may this defendant have judgment against the Scandinavian-American Building Company, for the sum of \$84,289.98 and interest, as aforesaid, as well as an attorney's fee of \$10,000, for foreclosing and enforcing this lien, and for its necessary costs and disbursements herein, and

May it be adjudged and decreed that this defendant has a valid first lien on the said building, and the premises hereinbefore described, and may the said lien be foreclosed, and may the said building and premises be decreed to be sold for the satisfaction of the judgment so found due to this defendant, according to the practice of this court, and

May the proceeds of the sale be applied to the satisfaction of the judgment of this defendant.
[197]

Further this defendant prays that said defendants, and all persons claiming under them, or either of them, subsequent to the filing and recording of this defendant's lien, in the office of the auditor of Pierce County, Washington, either as purchasers or encumbrancers, lienors, or otherwise, may be barred and foreclosed of all right, claim or equity of redemption in the said premises, and every part thereof, and that it may have a judgment and execution against the defendant, Scandinavian-American Building Company for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of its judgment. That this defendant, or any other parties to this

suit, may become a purchaser at said sale, and that the officer executing the sale, shall execute and deliver the necessary conveyances to the purchaser or purchasers, and that said purchaser or purchasers at said sale, may be let into the possession of said premises.

That this defendant may have such other and further relief in the premises, as may be just and equitable, and as to this court shall seem just.

CHARLES P. LUND,

DAVIS & NEAL,

Attorneys for Defendant, Washington Brick, Lime
& Sewer Pipe Company. [198]

Exhibit "A."

CONTRACT.

THIS AGREEMENT, made this 28th day of February, A. D. 1920, by and between Scandinavian-American Building Company, a corporation, hereinafter called the "Owner," party of the first part, and Washington Brick, Lime & Sewer Pipe Company, a corporation organized and existing under the laws of the State of Washington, hereinafter called the "Contractor," party of the second part,

WITNESSETH:

WHEREAS, the said Scandinavian-American Building Company, Owner, is about to begin the erection of a sixteen-story building on the propetry situated in Pierce County, Washington, described as follows: Lots (10), Eleven (11) and Twelve (12) in Block One Thousand Three (1003), as shown

and designated upon a certain plat entitled "Map of New Tacoma, W. T.," of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Penn., architect, and

WHEREAS, The said Washington Brick, Lime & Sewer Pipe Company is desirous of entering into a contract with the said Scandinavian-American Building Company, Owner, to furnish all the terra cotta above the dentil course over the back on two sides, being 11th and Pacific Avenue, the alley side to run to the granite base; the rear to run down to the wall of the adjoining building, according to estimate of February 19th, 1920, attached hereto; under and subject to all terms, limitations and conditions contained in the plans and specifications hereinbefore referred to.

NOW THIS AGREEMENT WITNESSETH,

Art. I. That in consideration of the agreements herein contained, the Owner agrees to pay the Contractor, the sum of One Hundred Nine Thousand Dollars (\$109,000.00) in installments as hereinafter stated. Said payments, however, in no way lessening the total and final responsibility of the Contractor. No payment shall be construed or considered as an acceptance of any defective work or improper material.

Although it is distinctly understood and agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible, yet for the convenience of the Contractor,

it is stipulated that payments shall be made as follows:

75% monthly, to be paid in cash, of the estimated value of material delivered, and the balance of 25% to be paid within thirty (30) to sixty (60) days from the completion of this contract.

Art. II. The said Contractor hereby covenants, promises and agrees to do all of the aforesaid work to be furnished and finished agreeably to the satisfaction, approval and acceptance of the Architect of said building and to the satisfaction, approval and acceptance of the said Owner, according to the true intent and meaning of the drawings, plans [199] and specifications made by said Architect, which said plans, drawings and specifications are to be considered as a part and parcel of this agreement, as fully as if there were at length herein set forth, and the said Contractor is to include and do all necessary work under his contract, not particularly specified, but required to be furnished and done in order to fully complete and fulfill his contract to the satisfaction of the said Architect and Owner aforesaid.

Art. III. The Contractor hereby agrees that time shall be considered the very essence of this contract and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the Contractors are working. And the said Contractor further covenants and agrees to perform the work promptly, without notice on the part of anyone, so as to complete the building at the earliest possible moment.

Art. IV. The Contractor further covenants and agrees to observe carefully the progress of the work upon the entire building, without notice from anyone, and to procure drawings at least two weeks prior to executing the work, and to perform his portion of the work upon said building at the earliest proper time for such work, and to be responsible for all loss occasioned directly and indirectly by any lack of knowledge upon his part, as to the proper time to perform his work.

Art. V. The said Contractor shall complete the several portions and the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz:

Delivery of the aforementioned material to commence within four (4) months from the date of this contract, and to be completed within six (6) months.

Should the Contractor be delayed in delivering his material, by the owner, certificates are to be given for payment for material completed at the factory.

Art. V $\frac{1}{2}$. The Purchaser shall furnish to the Manufacturer such further drawings or explanations as either party may consider necessary to detail and illustrate the work to be made, and the Manufacturer shall conform thereto as a part of this contract so far as the same may be consistent with the original drawings and specifications hereinbefore referred to and with the technical possibilities of the material.

Art. VI. Should the Contractor be delayed in the progress of the work under this contract by

strike, or common carrier, or casualty wholly beyond the control of the Contractor, then the time herein designated for the completion of said work shall be extended for a period equivalent to the time lost, but no such allowance shall be made unless a claim therefor is presented in writing by the Contractor within twenty-four hours of the occurrence of such delay. [200]

Art. VII. And in case of default in any part of the said work within the times and periods above specified, the Contractor hereby promises and agrees to pay the Owner, and the Owner may deduct from any amount coming to the Contractor the sum of Fifty (\$50.00) Dollars for each and every day's delay until the completion of the work, not in the nature of a penalty, but in the nature of liquidated damages for the delay caused to the Owner in the completion of the work.

Art. VIII. Any imperfect workmanship or other faults which may appear within one year after the completion of said work, and in the judgment of said Architect arising out of improper materials and workmanship, shall upon the direction of said Architect, be amended and made good by, and at the expense of the said Contractor, and in case of default so to do, the Owner may recover from said Contractor the cost of making good the work.

Art. IX. The Contractor hereby agrees to remove the dirt and rubbish accumulating on the premises, caused by the construction of his work, at such time or times as he may be instructed by the Owner or his representatives, and if not removed

promptly by the Contractor, the Owner is hereby authorized to remove the same at the expense of the said Contractor, and to deduct the cost thereof from any balance that may be due and owing him.

Art. X. And should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or materials of the proper quality or fail in any respect to prosecute the work with promptness and diligence or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect or the Owner, the latter shall be at liberty after two days' written notice to the Contractor to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this Contract; and if the Architect or the Owner shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to determine the employment to the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon and to employ any other person or persons to finish the work and provide the materials therefor; and in case of such discontinuance of the employment of the Contractor, the latter shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time if the unpaid balance of the amount to be paid under this contract shall exceed the expense in-

curred by the Owner in finishing the work said excess shall be paid by the Owner to the Contractor; but if said expenses shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expenses incurred by the Owner as herein provided, either for furnishing the materials or for finishing the work and any damage incurred through such default shall be itemized and certified by the Owner, which itemized statement shall be conclusive upon the Contractor. [201]

Art. XI. And the Owner reserves the right, that if there be any omission or neglect on the part of the said Contractor of the requirements of this agreement and the drawings, plans and specification, the said Owner may, at its discretion, declare this contract, or any portion thereof, forfeited; which declaration and forfeiture shall exonerate, free, and discharge the said Owner from any and all obligations and liabilities arising under this contract, the same as if this agreement had never been made; and any amount due the Contractor by reason of work done or materials furnished prior to the forfeiture of this contract, shall be retained by the said Owner until full completion and acceptance of the building upon which said work has been done or said materials furnished, at which time the said Owner, after deducting all costs and expenses occasioned by the default of the said Contractor, shall pay or cause to be paid to him the balance with a statement of all said costs and expenses.

Art. XII. And the Contractor further covenants, promises and agrees that he will make no

charge for any extra work performed or materials furnished in and about his contract, and he hereby expressly waives all right to any such compensation, unless he shall first receive an order in writing for the same from the Owner.

Art. XIII. And the Contractor hereby assumes entire responsibility and liability in and for any damage to persons or property during the fulfillment of this contract, caused directly or indirectly by the Contractor, his agents or employees, and the Contractor agrees at his own expense to carry sufficient liability and workmen's compensation insurance and to enter in and defend the Owner against, and save it harmless from loss or annoyance by reason of suits or claims of any kind on account of such alleged or actual damages; or on account of alleged or actual infringements of patents in regard to any method, device or apparatus, or any part thereof, put in, under or in connection with this contract, or used in fulfilling the same.

The Contractor hereby further agrees not to assign or sublet in any manner whatsoever, any part or portion of this contract, without the written consent of the Owner, upon the express penalty of forfeiture of the entire contract, in the discretion of the Owner.

Art. XV. And the Contractor shall at all times, when required by the Owner, before receiving any moneys under this contract, produce satisfactory vouchers and receipts from all employees and materialmen for work done and materials furnished

in and about the erection and completion of the building covered by this contract.

Art. XVI. And any and all work that may be cut out and omitted from this contract, during the progress of the work, shall be allowed by the Contractor at the regular contract price, and shall be adjusted and agreed upon by said parties before the final settlement of their accounts. [202]

Art. XVII. The Owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part thereof, or to any of the materials or other things done, furnished and supplied by the Contractor, used and employed in finishing and completing the same.

Art. XVIII. It is hereby further mutually covenanted, promised and agreed, by and between the said parties, that in the event of any dispute or disagreement hereafter arising between them as to the character, style or portion of the work on said buildings to be done, or materials to be furnished under this contract, or the plans or specifications hereinbefore referred to, or any other matter in connection therewith, the same shall be referred to three arbitrators, one to be chosen by each of the parties hereto, and the third by the two arbitrators so selected, whose decision, or that of a majority of them in the matter, shall be final and binding upon them.

Art. XIX. The Contractor shall, upon request from the Owner, furnish forthwith a bond or bonds in form and substance and with surety satisfactory

to the Owner, in the sum of Fifty-four Thousand (\$54,000,00) Dollars conditioned for the true and faithful performance of this contract on the part of the Contractor. The Bond, however, to be paid for by the Owner.

Art. XX. All negotiations and agreements, oral or written, prior to this agreement, are merged herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except as herein set forth. This agreement cannot be changed, altered or modified in any respect except by the mutual consent of the parties endorsed hereon in writing and duly executed.

The Contractor has read and fully understands this agreement and the said Contractor hereby certifies that before the execution of his agreement he examined all the plans and specifications prepared in connection with the contract.

And it is further agreed that the covenants, promises and agreements herein contained shall be binding upon and final upon the heirs, executors, administrators and successors of the parties hereto.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of
SCANDINAVIAN-AMERICAN BUILD-
ING COMPANY,

By CHARLES DRURY,

Its President.

(Seal)

J. SHELDON,

Its Secretary.

WASHINGTON BRICK, LIME & SEWER
PIPE COMPANY,

Contractor.

By V. E. PIOLLET,

Vice-President.

CHARLES P. LUND,

Secretary. [203]

Exhibit "B."

WASHINGTON BRICK, LIME & SEWER
PIPE COMPANY, a Corporation.

Claimant,

vs.

SCANDINAVIAN-AMERICAN BUILDING
COMPANY, a Corporation.

NOTICE OF CLAIM OF LIEN.

NOTICE IS HEREBY GIVEN that the Wash-
ington Brick, Lime & Sewer Pipe Company, a cor-
poration organized under the laws of the State of
Washington, with its principal place of business at
Spokane has and claims a lien upon certain real
property described as:

Lots Ten (10), Eleven (11) and Twelve (12), in Block One Thousand Three (1003), as shown and designated on the map and plat of New Tacoma, as filed in the office of the Auditor of Pierce County, Washington,

for materials furnished to Scandinavian-American Building Company, a corporation organized under the laws of the State of Washington, with its principal place of business at Tacoma, pursuant to a written *written* agreement between said Claimant and said Scandinavian-American Building Company, a corporation, as owner, dated February 28th, 1920, whereby said claimant agreed to furnish all the terra cotta for a building to be erected upon said real property herein described, according to plans and specifications prepared by the architect of said owner, and according to further drawings and explanations to be furnished by the owner, necessary to detail and illustrate the work to be made, for which the owner agreed to pay the sum of One hundred nine thousand (\$109,000.00) Dollars.

That pursuant to said contract, said Claimant commenced to deliver said materials to be used upon and in the construction of the building on said real estate, on September 25th, 1920, and ceased to deliver the same on or about January 13th, 1921.

That the owner or reputed owner of said real estate is Scandinavian-American Building Company, a corporation.

That there is now due and owing to said Washington Brick, Lime & Sewer Pipe Company, a corporation, claimant, from said Scandinavian-American

Building Company, a corporation, owner, the sum of Eighty-nine thousand (\$89,000.00) dollars, with interest, over and above all just credits and offsets, for which said sum said claimant has and claims a lien upon said real estate.

WASHINGTON BRICK, LIME & SEWER
PIPE COMPANY, a Corporation,

By A. B. FOSSEEN,

Its President.

Recorded February 24, 1921, on page 26, Book 16,
Record of Liens, Pierce County, Washington. [204]

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Southern
Division. Jul. 25, 1921. F. M. Harshberger,
Clerk. By Ed M. Lakin, Deputy. [205]

**Answer of Scandinavian-American Building Com-
pany, a Corporation, and F. P. Haskell, Jr., as
Receiver of the Scandinavian-American Build-
ing Company, to Cross-complaint of Washing-
ton Brick, Lime & Sewer Pipe Company.**

The defendants, Scandinavian-American Build-
ing Company, a corporation, and F. P. Haskell, Jr.,
as Receiver of the Scandinavian-American Build-
ing Company, in answer to the cross-complaint of
the Washington Brick, Lime and *Sewer Company*,
a corporation,—

I.

Deny the allegations contained in paragraph ten
thereof and deny that the Scandinavian-American

Bank of Tacoma at any time desired and intended or in any manner intended to construct a building of any kind, name or nature, upon any property whatsoever, and deny that the said bank at any time employed Frederick Webber to prepare the plans and drawings of any proposed building.

II.

Answering paragraph eleven, defendants deny that the said bank at any time whatsoever had any purpose to erect any building whatsoever or that said bank ever procured its board of directors, or any other persons to incorporate the said Scandinavian-American Building Company or that the said bank in any way caused or procured the execution and filing of articles of incorporation of the Scandinavian-American Building Company, by the persons therein mentioned, or any other persons.

III.

Answering paragraph eleven, on page seven of said cross-complaint, these defendants deny that the said bank at [206] any time acquired any property from the said Charles Drury, but allege that the said real property was deeded by the said Charles Drury for a valuable consideration to the said Scandinavian-American Building Company.

IV.

Answering paragraph twelve, these defendants deny that the said bank transferred any property whatsoever to the Scandinavian-American Building Company without consideration and deny that the said Scandinavian-American Building Company at

any time or for any purpose was the agent or trustee of the said Scandinavian-American Bank at Tacoma, and deny that the said Scandinavian-American Bank conducted any operations or made any contracts in the erection of the structure therein mentioned.

V.

Answering paragraph thirteen, these defendants deny that the said bank in any manner caused any mortgage upon the said property to be executed, and deny that the mortgage therein mentioned was executed without consideration, and deny that the assignment of the said mortgage was made to the said bank without consideration.

VI.

Answering paragraph XIV these defendants deny that the said bank entered into any contract whatsoever with the cross-complainant, but allege that the contract therein referred to was made by the defendant with the said Scandinavian-American Building Company. [207]

VII.

Answering paragraph XV, these defendants deny that the cross-complainant furnished any material whatsoever to the said Scandinavian-American Bank or the said Scandinavian-American Building Company, but allege that none of the material mentioned in said paragraph was ever delivered either to the said Scandinavian-American Bank of Tacoma, or to the said Scandinavian-American Building Company and deny that the said cross-complainant in fact manufactured any con-

siderable portions of the materials therein mentioned.

VIII.

Answering paragraph XVI these defendants deny that the cross-complainant was at any time ready, willing and able to furnish the material, or any part thereof as specified in said contract, or at all.

IX.

Answering paragraphs XVII and XVIII these defendants allege that they have not knowledge or information sufficient to form a belief as to the truth or falsity of the allegations therein contained, and they therefore deny the same and each and every one thereof.

X.

Answering paragraph XIX these defendants deny that the cross-complainant is entitled to \$10,000.00 as an attorney's fee herein, or any other sum whatsoever. [208]

XI.

Answering paragraph XXI of said cross-complaint these defendants allege that the cross-complainant at all times dealt with the Scandinavian-American Building Company and that the said cross-complainant is estopped by its own contract.

AS AN AFFIRMATIVE DEFENSE to the allegations contained in the cross-complaint of the said cross-complainant, these defendants allege:

I.

That the cross-complainant dealt with the said

defendant, Scandinavian-American Building Company, a corporation, as a corporate entity with reference to the matters and things set forth in the cross-bill of complaint herein and they thereby estopped themselves from denying the corporate entity of the said defendant, Scandinavian-American Building Company, and estopped themselves from denying a recital contained in the contract hereinafter mentioned, to the effect that the said Scandinavian-American Building Company was erecting the said building on the premises therein described and was the owner thereof.

AS A SECOND DÉFENSE against the cross-bill of the said cross-complainants, these defendants allege:

I.

That if the defendant, Scandinavian-American Building Company, a corporation, was, in law, the agent of the Scandinavian-American Bank of Tacoma in the erection of the said building as set forth by the cross-complainants, that nevertheless, the defendants, Washington Brick, Lime and Sewer Company have no lien against the said property and that the said cross-complainants in the furnishing of such material and supplies to be used in the [209] construction of the said building did not mail to the said Scandinavian-American Bank of Tacoma, a notice, in writing, stating substantially that it had commenced the delivery of such materials and supplies for use therein, that a lien might be claimed for the same, as it was required to do under the provisions of Section 1133 of Reming-

ton's Codes and Statutes of Washington, as a prerequisite to the filing of such lien.

AS A THIRD DEFENSE to the cross-bill of complaint of the cross-complainants, these defendants allege:

I.

That the cross-complainants by filing its claim with the liquidators of the said defendants, Scandinavian-American Bank of Tacoma, as set forth in the cross-bill of complaint herein, has estopped itself from proceeding upon the said cross-bill of complaint herein.

AS A FOURTH DEFENSE to the cross-bill of complaint of the defendants, Washington Brick, Lime & Sewer Company, these defendants allege:

I.

That the building materials mentioned in the said cross-complaint as having been shipped to Tacoma by the cross-complainant are still in the possession of the said cross-complainant in the city of Tacoma, but that said materials were not shipped in accordance with the said contract, in this, to wit, that the materials for the lower floors of the said building have not been shipped complete, and that much of said materials is worthless for the reason that the same are cracked and split, and are not of uniform color. [210]

AS A FIFTH DEFENSE to the cross-bill of complaint of the cross-complainants these defendants allege:

I.

That since the institution of the above-entitled

action the Receiver herein called upon the said cross-complainant to deliver certain of the materials described in said contract and in its cross-complaint herein, in order that the same might be placed upon the said structure to preserve the same from the elements, but that the said cross-complainant then refused and has at all times refused to make delivery of any of such materials.

WHEREFORE these defendants pray that the prayer of the cross-complainant's cross-complaint be in all respects denied. •

F. D. OAKLEY,
KELLY & MacMAHON,
Attorneys for Answering Defts.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 19, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [211]

Reply to Answer and Cross-complaint of Washington Brick, Lime & Sewer Pipe Company.

Comes now complainant, McClintic-Marshall Company, a corporation, and for its reply to the cross-complaint and counterclaim of the Washington Brick Lime & Sewer Company as contained in its answer filed herein, says:

I.

For reply to the 15th paragraph of the cross-complaint and counterclaim, this complainant says that it is without any knowledge or information sufficient to form a belief as to the matters and

things therein alleged and therefore denies the same and demands strict proof concerning the allegations contained in said paragraph.

II.

For reply to the 16th paragraph of the cross-complaint and counterclaim this complainant says that it is without knowledge or information sufficient to form a belief as to the matters and things therein set forth and therefore denies the same and demands strict proof thereof.

III.

For reply to the 17th paragraph of the cross-complaint and counterclaim this complainant admits that on the 24th day of February, 1921, the cross-complainant filed a [212] notice of lien in writing in the auditor's office of Pierce County, Washington, copy of which lien is attached to the answer, marked Exhibit "B," but this complainant says that it has no knowledge or information sufficient to form a belief as to whether the amount claimed in the lien is the correct amount due to said cross-complainant from the Scandinavian-American Building Company for the materials alleged to have been furnished and demands strict proof thereof.

IV.

For reply to the 19th paragraph of said cross-complaint and counterclaim this complainant admits that if cross-complainant prevails in this proceeding and establishes its lien for the amount claimed or for any other amount, it will be entitled to a reasonable attorney's fee, but denies that the sum of \$10,000 is a reasonable attorney's fee to be allowed,

and avers that if the attorney's fees be allowed to the cross-complainant if it should prevail, ought to be fixed by the Court.

E. M. HAYDEN,
M. A. LANGHORNE,
F. D. METZGER,
Attorneys for Complainant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [213]

**Order Allowing Ben Olson Company Leave to File
Amended Answer and Cross-complaint.**

Upon the application of Stiles & Latcham and J. F. Fitch, its attorneys—

ORDERED that defendant Ben Olson Company have leave to file an amended answer in the above-entitled action.

EDWARD E. CUSHMAN,
District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 24, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [214]

Amended Answer of Ben Olson Company.

Now comes the Ben Olson Company, a corporation organized under the laws of the state of Washington,

one of the defendants in the above-entitled action, and for its amended answer and counterclaim answers the amended and supplemental bill of complaint herein, under leave of the Court first had and obtained, as follows, to wit:

I.

This defendant denies knowledge as to the matters and things alleged in paragraphs XIV, XV, XVI and XVII of said amended and supplemental bill of complaint and therefore denies the same.

II.

This defendant denies knowledge as to the matters and things alleged in paragraph XVIII of said amended and supplemental bill of complaint except that it admits it has a right and interest in and to, and a lien upon said premises referred to in said complaint, but denies that said right, interest and lien is junior, subsequent and inferior to the lien of the complainant.

III.

This defendant denies each and every allegation, matter and thing contained in paragraph XIX of said amended and supplemental bill of complaint.

IV.

This defendant denies knowledge as to the matters and things contained in paragraph XX of said amended and supplemental bill of complaint and therefore denies the same. [215]

And for its cross-complaint and counterclaim against the complainant, and for cause of action against the Scandinavian-American Building Company, a corporation, and Forbes P. Haskell, its

Receiver; Scandinavian-American Bank of Tacoma, a corporation; John P. Duke, as Supervisor of Banking of the State of Washington; and Forbes P. Haskell, as Assistant Supervisor of Banking of the State of Washington in charge of the liquidation of said bank, this defendant alleges and shows:

I.

That the Ben Olson Company is now and at all the times hereinafter mentioned, has been a corporation organized and existing under the laws of the State of Washington; that its annual license fee last due has been paid; and that it is a citizen of the State of Washington with its principal place of business in the City of Tacoma, Washington.

II.

That the Scandinavian-American Bank of Tacoma and the Scandinavian-American Building Company are corporations, organized and existing under the laws of the State of Washington; are citizens of said State and are residents of the Southern Division of Western District of the State of Washington; that John P. Duke is the regularly appointed, qualified and acting Supervisor of Banking of the State of Washington, and successor in office of Claude P. Hay, named in the amended and supplemental bill of complaint as Commissioner of Banking for the State of Washington; that Forbes P. Haskell is the regularly appointed, qualified and acting assistant Supervisor of Banking of the State of Washington, and in charge of the liquidation of the affairs of the said Scandinavian-American Bank of Tacoma; that Forbes P. Haskell is also

the regularly appointed, qualified and acting receiver of the Scandinavian-American Building Company, and that leave to make the said Forbes P. Haskell, as receiver of the Scandinavian-American Building Company, a party to this action, has been heretofore entered by this Court. [216]

III.

On information and belief, this defendant alleges that the defendants Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maud A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, constitute a copartnership, doing business in Tacoma, Washington, under the name and style of Tacoma Millwork and Supply Company, and all of said named defendants, with the exception of Hattie Davis Tennant, are citizens of the State of Washington, and that the said Hattie Davis Tennant is a citizen of the State of California.

IV.

On information and belief, this defendant alleges that G. Wallace Simpson is a citizen of the State of Missouri, and that the complainant, McClintic-Marshall Company, is a corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, and a citizen of said State.

V.

On information and belief, this defendant alleges that the defendants, Savage-Scofield Company; Puget Sound Iron & Steel Works; E. E. Davis &

Company; Henry Mohr Hardware Company, Inc.; Hunt & Mottet Co.; Edward Miller Cornice & Roofing Company; Far West Clay Company; St. Paul & Tacoma Lumber Company; United States Machine & Engineering Company; Washington Brick, Lime and Sewer Company, are all corporations organized and existing under the laws of the State of Washington, and citizens of said State.

VI.

On information and belief this defendant alleges that the defendant, Otis Elevator Company is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and a citizen of said State, but has been admitted to do business in the State of Washington by virtue of having complied with the laws of the State of Washington, relative to foreign corporations. [217]

VII.

On information and belief, this defendant alleges that the defendants, H. C. Greene, doing business as H. C. Greene Iron Works; J. D. Mullins, doing business as J. D. Mullins Bros.; S. O. Matthews and Frank L. Johns, a copartnership, doing business under the name of City Lumber Agency; Carl Gebbers and Fred S. Haines, copartners, doing business under the firm name and style of Ajax Electric Company; S. J. Pritchard and C. H. Graves, copartners, doing business as P. & G. Lumber Company; Morris Kleiner, doing business as Liberty Lumber & Fuel Company; J. A. Soderberg, doing business as West Coast Monumental Company;

Theodore Hedlund, doing business as the Atlas Paint Company, and Robert M. Davis and Frank C. Neal, copartners, doing business under the firm name and style of Davis & Neal, are all citizens of the State of Washington and residents of the Southern Division of the Western District of Washington.

VIII.

On information and belief this defendant alleges that the defendants, F. W. Madsen; Gustaf Jonasson; N. A. Hanson; A. J. Van Buskirk; C. W. Grouse; F. L. Swain; D. A. Trolson; Fred Gustafson; E. Scheibal; Paul Scheibal; F. J. Kazda; W. Donnellan; P. Hagstrom; Arthur Purvis; Roy Farnsworth; C. B. Dustin; L. J. Pettifer; Charles Bond; L. H. Broten; W. Canady; L. R. Lilly; F. McNair; Dave Shields; Ed Lindberg; Joe Tikalsky; F. Monte; C. Gustafson; George Larson; F. Marcellino; M. Swanson; William Griswold; C. E. Olson; C. I. Hill; Emil Johnson; C. Peterson; Earl Whitford; F. A. Fetterly; Thomas S. Short; Sherman Wells; Carl J. Gerringer; George Gerringer; F. R. Schoen; A. W. Anfang; C. H. Boedecker; William L. Owne; F. N. Bergren; F. H. Godfrey and W. E. Morris, are each and every one of them citizens of the State of Washington, and residents of the Southern Division of the Western District of Washington.

IX.

Further, defendant shows that the matter and amount in the above-entitled action exceed, exclusive of costs, the sum of \$3000.00 [218]

X.

That on and prior to November 1st, 1919, the Scandinavian-American Bank of Tacoma, was the owner in fee of Lots Eleven (11) and Twelve (12) in Block one thousand and three (1003) as the same are shown and designated on a certain plat entitled "Map of New Tacoma, W. T.," filed in the Auditor's office of Pierce County, Washington, February 3d, 1875, and was occupying said building and conducting therein its banking business.

That said bank, desiring to enlarge its banking facilities and to provide more extensive and elaborate quarters, employed one Frederick Webber, an architect of Philadelphia, Pa., to prepare plans and drawings of a proposed building to be erected on said real estate, and subsequently, said architect prepared and delivered to said Bank, plans and drawings thereof.

XI.

That after receiving said plans and drawings, and in order to avoid the appearance to the general public that said bank was using its resources in the building of said structure, it caused certain of its directors and stockholders, to wit: J. E. Chilberg, and Gustav Lindberg, to execute Articles of Incorporation of the Scandinavian-American Building Company, with a capital stock of Two Hundred Thousand Dollars (\$200,000.00), designating as trustees thereof, J. E. Chilberg, O. S. Larson, Jafet Lindberg, Gustaf Lindberg, Charles Drury, James R. Thompson and George G. Williamson, who were also all of the directors of said bank, to

serve for the first six months, and said Larson, as President of said bank subscribed for all of the capital stock of said corporation, except one share each held by said trustees, in order to qualify them as trustees.

XII.

That on or about February 9, 1920, said bank purchased from Charles Drury, one of its directors, and his wife, Lot Ten (10) in said Block one thousand and three (1003), adjoining said building.

XIII.

Thereafter, on or about March 10, 1920, said bank, without any consideration, although its value was in excess of One Hundred [219] Thousand Dollars (\$100,000.00), executed and filed a deed of conveyance to said building company of Lots Eleven (11) and Twelve (12) aforesaid; and thereupon, said bank, in pursuance of its said plans and in the name of said building company, but in truth and in fact, as its agents and trustees, entered upon the construction of a sixteen story building which contemplated a cost and expenditure of in excess of \$1,200,000.00. And thereafter, said building operations, negotiations of contracts for materials and work thereon and all business of every kind in connection therewith was carried on and conducted by the principal officers of the bank and all payments for materials, labor and other service were made by said bank.

XIV.

On or about March 10, 1920, said bank, in the name of said building company, caused a mortgage

on said real estate to be executed and filed, to one G. Wallace Simpson, to secure the payment of \$600,000.00, but no consideration was paid or advanced, or contracted to be paid or advanced thereunder.

On or about January 21st, 1921, said bank after its insolvency as hereinafter stated, without any consideration therefor, procured said Simpson to execute a written assignment of said mortgage to said bank and caused said assignment to be filed in the Auditor's office of Pierce County, Washington. That shortly thereafter, said Scandinavian-American Bank of Tacoma was declared insolvent and placed in charge of Forbes P. Haskell, as Deputy Bank Commissioner of the State of Washington, and afterwards, said Deputy Bank Commissioner without any lawful authority therefor, procured an assignment to be executed to him of a mortgage to secure an indebtedness of Seventy Thousand Dollars (\$70,000.00), on said real estate, and now claims to hold title thereto.

XV.

That thereupon, and on the 27th day of February, 1920, the said Scandinavian-American Bank of Tacoma further procured its said directors to enter into a contract with the defendant Ben Olson Company, in the name of said Scandinavian-American Building Company, as [220] the contracting party, by said Drury, its President, but in behalf of said Scandinavian-American Bank of Tacoma, for the plumbing and heating materials and labor, for said building, for the express sum of Ninety Thousand Dollars, (\$90,000.00), but for the actual sum of

Ninety-one Thousand Dollars (\$91,000.00), One Thousand Dollars of which sum was to be paid, and was paid, by sale and delivery to this defendant of the radiators upon the old building; and said contract provided that the sum of Ninety Thousand Dollars should be paid as follows, to wit:

“75% monthly, to be paid in cash of the estimated value of work delivered and also of work erected in place, and the balance to be paid within thirty (30) to sixty (60) days from the completion and acceptance of work by the Architect.”

And it was further provided by said contract as follows, viz:

“Contractor to follow erection of steel work with all main lines for plumbing and heating and to buy, if necessary, piping in the open market in order to keep up with the steel work, so that the whole of said work can be completed within ten (10) months from the date of this contract.”

A copy of said contract is annexed hereto, and made a part hereof, being marked, “Ben Olson Company Exhibit ‘A.’ ”

XVI.

That this defendant, Ben Olson Company, furnished its bond for \$45,000.00, and otherwise complied with all of the terms of said contract, and, commencing with July 1, 1920, it furnished and delivered to said premises materials for said plumbing and heating, as follows:

1920

July 1,	materials of the value of	
(1)	.....	\$8,378.03
August 30,	materials of the value of	
(2)	.....	7,764.83
January 4,	materials of the value of	
(3)	.....	7,814.40
January 15,	materials of the value of	
(4)	.....	675.81
Total		<hr/> \$24,633.07

XVII.

That this defendant, Ben Olson Company, also procured ready for delivery, and stored in its warehouse, materials for said plumbing and heating of said building not adapted to any other building, as follows: [221]

1921

Jan. 4,	materials of the value of.....	\$5,875.60
	and	2,250.00
Total		<hr/> \$8,125.60

XVIII.

That this defendant, Ben Olson Company, also procured from Crane Company, 86 Closets complete with fixtures adapted to said building, which Crane Company charges against this defendant, parts of which were delivered to said building, and the remainder of which it has ready for delivery in its warehouse in Tacoma; said closets not being adapted to any other building.

January 21, 1921, 86, remainder of closets of the value of \$6,132.66.

XIX.

That this defendant, Ben Olson Company, also procured from Crane Company, certain toilet-room and lavatory materials and fixtures adapted only to said building, which Crane Company charges against this defendant, and has ready for delivery, in its warehouses in Tacoma; said toilet-room and lavatory materials and fixtures not being adapted to any other building.

January 21, 1921, Toilet and Lavatory materials and fixtures of the value of\$12,910.76.

XX.

That all of said materials and fixtures not actually delivered on said premises were procured by this defendant in time, and would have been delivered and put in place in said building, within the time provided in said contract, but for the fact that the construction of said building was so delayed by the owners and the steel contractors thereof, that the same could neither be placed upon the premises nor erected.

XXI.

That this defendant furnished and performed labor in the construction of the plumbing and heating of said building, under said contract, which continued until January 15, 1921, of the value of\$2,279.80.

[222]

XXII.

That no part of the said contract price of Ninety-

one Thousand Dollars has been paid, except the following, viz:

July 1, 1920, by Radiators in old		
Building	\$	1,000.00
July 13, 1920, Account of Materials,		
(Cash)		6,283.52
Account of Labor		
(Cash)		122.25
Sept. 24, 1920, A/c of Materials		
(Cash)		
A/c of Labor (Cash)	156.00	6,019.79

Total Payments ..\$	13,425.56
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XXIII.

That to have completed the work of the plumbing and heating of said building under said contract, this defendant Ben Olson Company, would have had to procure and furnish additional materials of the value of\$16,691.64 and additional labor at a cost of 11,196.70 or a total additional expense of\$27,888.34

Whereby the entire cost of the labor and materials to this defendant, upon said plumbing and heating contract work, would have been\$79,690.43 and the remainder of the contract price of said work being \$91,000.00, less the entire expense for labor and materials above stated, to wit: \$8,029.77, would have been an earned profit of this defendant, under said contract.

XXIV.

That this defendant, Ben Olson Company, was, at all times ready, able and willing to proceed with said plumbing and heating work, under said con-

tract, and would have proceeded with and completed the same, and would have earned the said profit of \$8,029.77, but for the following facts to wit:

The construction of said building was proceeded with, so that on the 15th day of January, 1921, the steel framework thereof was practically completed, and this defendant had been able to install a small part of the plumbing and heating materials, and awaited progress of the other contractors to permit it to install the remainder thereof, but on the 15th day of January, the said Scandinavian-American [223] Bank of Tacoma, which had provided and paid the money necessary for cash payments for the construction of said building up to that time, became insolvent, and its affairs were taken possession of by the said Claude P. Hay, as State Bank Commissioner (whose successor in office is defendant John Duke, Supervisor of Banking), who proceeded to liquidate it, with the assistance of the said Forbes P. Haskell, as Deputy State Bank Commissioner, and, thereafter, and on said 15th day of January, 1921, and because of the insolvency of said Scandinavian-American Bank of Tacoma, and said Hay, as such State Bank Commissioner, and said Scandinavian-American Building Company; and said Scandinavian-American Bank of Tacoma, and said Scandinavian-American Building Company failed, neglected and refused to pay to this defendant the sum of \$14,288.18, being 75% of the value of the materials and labor of the value of \$19,050.90, which had been theretofore certified as delivered and performed, on the 4th

day of January, 1921, by the Architect of said building; whereupon and wherefore, this defendant was compelled to cease all work on said building, and said contract was terminated.

XXV.

That thereafter, and on the 14th day of April, 1921, and within 90 days after the furnishing of its last materials, and the performance of its last labor upon said building, this defendant duly filed and recorded with the County Auditor of said Pierce County, its claim of lien, duly verified by oath, for the said materials and labor upon said Lots 10, 11 and 12, in Block 1003 as provided by the laws of the State of Washington, in the sum of \$41,666.52; a copy of which lien claim is hereto attached, and made a part hereof, being marked "Ben Olson Company Exhibit 'B' "; and that by inadvertence and mistake, the name of said Scandinavian-American Building Company, in the caption of said lien claim, and in the fifth line of the body of said claim was wrongly written "Scandinavian Building Company," and this defendant will upon the hearing of this cause, ask leave of the Court, to amend said claim of lien so that the true name of said Scandinavian-American Building Company, may appear in all the parts thereof. [224]

XXVI.

That this defendant has commenced no action for the foreclosure of its said lien, or for the recovery of the sum due it upon said contract; though it heretofore presented to said State Bank Commis-

sioner its claim as a creditor of said Scandinavian-American Bank of Tacoma, which he disallowed.

XXVII.

That Article XIV of said contract read as follows:

“Art. XIV. And the Contractor further agrees for himself, his heirs, executors, administrators and assigns to waive all right to any mechanic’s claim or lien against said premises, and hereby agrees not to file any claim or lien whatsoever against the premises involved in this contract.”

That at the time of the execution of said contract, this defendant objected to the inclusion of said article therein, and refused to execute the same with said article therein. But thereupon, to induce this defendant to execute said contract with said article included, the following representations were made to it by Ole S. Larsen, President of said Scandinavian-American Bank of Tacoma and Charles Drury, President of said Scandinavian-American Building Company, to wit:

1. That all other contracts for labor and materials for said building contained and would contain a like provision for waiving of liens.

2. That contracts had been made between said Bank and said Building Company, and certain third persons, that said third persons would furnish all the money necessary to pay the cost of said Building in the sum of One Million Two Hundred and Fifty Thousand (\$1,250,000) Dollars, and would accept mortgages on said premises to secure

the repayment of said sum; but that it was necessary, in order to secure the said money, that said premises should remain free of liens.

That this defendant believed and relied upon said representations, and thereupon so believing and relying, executed said contract, but would not have done so but for said belief and reliance. [225]

That had said representations been true said building would have been fully financed, and all labor and materials would have been paid for, and the necessity for any claims or liens would have been obviated.

That neither of said representations was true. That many of the most important contracts for labor and materials to be furnished for said building did not contain waivers of the right to file liens; and no contracts had been made, or were ever made, with third persons to furnish \$1,250,000.00 or any other sum for the financing of said building construction.

That the falsity of said representations was not known to this defendant until after the commencement of this action.

And that by reason of the foregoing facts, and of the abandonment of said contract by the said Bank and Building Company, they and the said John P. Duke, Supervisor of Banking and Forbes P. Haskell, Receiver of said Scandinavian-American Building Company, are, and each of them is, and of right ought to be estopped from asserting said Article XIV of said contract against this defendant.

WHEREFORE, the defendant, Ben Olson Company, prays the judgment of this Honorable Court, in its behalf, as follows:

1. That the defendants, Scandinavian-American Bank of Tacoma, Scandinavian-American Building Company, and John P. Duke, as State Supervisor of Banking for the State of Washington, and Forbes P. Haskell as Receiver of said Scandinavian-American Building Company, and all other defendants, may be required to answer to the matters herein alleged as this defendant's counterclaim.

2. That this defendant may have judgment herein against the said Scandinavian-American Bank of Tacoma, said Scandinavian-American Building Company, and said John P. Duke, as State Supervisor of Banking for the State of Washington, and Forbes P. Haskell, as Receiver of said Scandinavian-American Building Company, for the sum of Forty-nine Thousand Six Hundred and Eighty-six and 10/100 Dollars (\$49,686.10), less such sum as may be awarded herein to the said Crane Company, upon [226] its lien claim, if any, with interest thereon, from January 15, 1921, together with a further sum equal to seven per cent of its judgment as an attorney's fee of foreclosure, and its costs herein.

3. That the sum of \$41,666.52 (less any sum awarded herein to the said Crane Company), with the interest thereon, attorney's fees and costs, be adjudged at first and valid lien against the lands and premises hereinbefore described.

4. That the sum of \$8,029.77, included in said

judgment, with the interest thereon, be adjudged and allowed as a claim established against the property and assets of said Scandinavian-American Bank of Tacoma, in liquidation in the hands of the said John P. Duke, as State Commissioner of Banking of the State of Washington.

5. That said lands and premises and the building thereon be ordered sold, in satisfaction of the amount so found due to this defendant, for which it is entitled to a lien, according to law and the practice of this Court, and that the proceeds of such sale be applied to the payment of this defendant's lien, judgment and costs.

6. That any deficiency that may remain after said sale, and after the application of the proceeds thereof to the payment of this defendant's lien judgment for said \$41,666.52, interest, attorney's fees and costs, may be likewise adjudged and allowed as a claim established against the property and assets of the said Scandinavian-American Bank of Tacoma, in liquidation in the hands of the said John P. Duke, as supervisor of Banking of the State of Washington.

7. That this defendant, or any other party to this action may become a purchaser at the sale of said property, and that the officer executing the order of sale, execute and deliver the necessary conveyance to the purchaser or purchasers; and that the purchaser or purchasers may be let into the possession of the premises upon production of such conveyance or conveyances.

8. That this defendant may have such other and further relief in the premises as may be just and equitable.

BEN OLSON COMPANY,
Defendant.

O. B. OLSON,
President.

STILES & LATCHAM and [227]

J. F. FITCH,

Attorneys for Ben Olson Company, Defendant.
[228]

Ben Olson Company Exhibit "A."

THIS AGREEMENT, made this 27th day of February, A. D. 1920, by and between Scandinavian-American Building Company, a corporation, hereinafter called the "Owner," party of the first part, and Ben Olson Co., of Tacoma, Washington, hereinafter called the "Contractor," party of the second part.

WITNESSETH:

WHEREAS, the said Scandinavian-American Building Company, Owner, is about to begin the erection of a sixteen story building on the property situated in Pierce County, Washington, described as follows: Lots Ten (10), Eleven (11) and Twelve (12) in Block One Thousand Three (1003) as shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Pennsylvania, Architect, and

WHEREAS, the said Ben Olson Co., of Tacoma, Washington, is desirous of entering into a contract with the said Scandinavian-American Building Company, Owner, to furnish all plumbing and heating, as per estimate of February 21, 1920, hereto attached, under and subject to all terms, limitations and conditions contained in the plans and specifications hereinbefore referred to.

NOW THIS AGREEMENT WITNESSETH:

Art. I. That in consideration of the agreements herein contained, the Owner agrees to pay to the Contractor the sum of Ninety Thousand and no/100 (\$90,000.00) Dollars in installments as hereinafter stated. Said payments, however, in no way lessening the total and final responsibility of the Contractor. No payment shall be construed or considered as an acceptance of any defective work or improper material.

Although it is distinctly understood and agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible, yet for the convenience of the Contractor, it is stipulated that payments shall be made as follows:

75% monthly, to be paid in cash, of the estimated value of work delivered and also of work erected in place, and the balance of 25% to be paid within thirty (30) days to sixty (60) days from the completion and acceptance of work by the Architect.

Art. II. The said Contractor hereby covenants, promises and agrees to do all of the aforesaid work to be furnished and finished agreeably to the satisfaction, approval and acceptance of the Architect

of said building and to the satisfaction, approval and acceptance of the said Owner, according to the true intent and meaning of the drawings, plans and specifications made by said Architect, which said plans, drawings and specifications are to be considered as a part and parcel of this agreement, as fully as if they were at length herein set forth, and the said Contractor is to include and do all necessary work under his contract, not particularly specified, but required to be furnished and done in order to fully complete and fulfill his contract to the satisfaction of the said Architect and Owner aforesaid.

Art. III. The Contractor hereby agrees that time shall be considered the very essence of this contract and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the Contractors are working. And the said Contractor further covenants and agrees to perform the work promptly, without notice on the part of anyone, so as to complete the building at the earliest possible moment.

Art. IV. The Contractor further covenants and agrees to observe carefully the progress of the work, upon the entire building, without, [229] notice from anyone, and to procure drawings at least two weeks prior to the execution of the work, and to perform his portion of the work upon said building at the earliest proper time for such work, and to be responsible for all loss occasioned directly and indirectly by any lack of knowledge upon his part, as to the proper time to perform his work.

Art. V. The said Contractor shall complete the

several portions and the whole of the work comprehended under this agreement by and at the time hereinafter stated, viz.:

Contractor to follow erection of steel work with all main lines for plumbing and heating and to buy, if necessary, piping in the open market in order to keep up with the steel work, so that the whole of said work can be completed within ten (10) months from the date of this contract.

It is also understood and agreed that the radiators from the old building are to belong to the contractor.

Art. VI. Should the Contractor be delayed in the progress of the work under this contract by strike, or common carrier, or casualty wholly beyond the control of the Contractor, then the time herein designated for the completion of said work shall be extended for a period equivalent to the time lost, but no such allowance shall be made unless a claim therefor is presented in writing by the Contractor within twenty-four hours of the occurrence of such delay.

Art. VII. And in case of default in any part of the said work within the times and periods above specified, the Contractor hereby promises and agrees to pay the Owner, and the Owner may deduct from any amount coming to the Contractor the sum of Fifty (\$50.00) Dollars for each and every day's delay until the completion of the work, not in the nature of a penalty, but in the nature of liquidated damages for the delay caused to the Owner in the completion of the work.

Art. VIII. Any imperfect workmanship or other faults which may appear within one year after the completion of said work, and in the judgment of said Architect arising out of improper materials or workmanship, shall, upon the direction of said Architect, be amended and made good by, and at the expense of, said Contractor, and in case of default so to do, the Owner may recover from said Contractor the cost of making good the work.

Art. IX. The Contractor hereby agrees to remove the dirt and rubbish accumulating on the premises, caused by the construction of his work, at such time or times as he may be instructed by the Owner or his representatives, and if not removed promptly by the Contractor, the Owner is hereby authorized to remove the same at the expense of the said Contractor, and to deduct the cost thereof from any balance that may be due and owing him.

Art. X. And should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality or fail in any respect to prosecute the work with promptness and diligence or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect or the Owner, the latter shall be at liberty after two days' written notice to the Contractor to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect or the Owner shall certify that

such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools, and appliances thereon and to employ any other person or persons to finish the work and provide the materials therefor; and in case of such discontinuance of the employment of the Contractor, the latter shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time if the unpaid balance of the [230] amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work said excess shall be paid by the Owner to the Contractor; but if said expenses shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expenses incurred by the Owner as herein provided, either for furnishing the materials or for finishing the work and any damage incurred through such default shall be itemized and certified by the Owner, which itemized statement shall be conclusive upon the Contractor.

Art. XI. And the Owner reserves the right, that if there be any omission or neglect on the part of the said Contractor of the requirements of this agreement and the drawings, plans and specifications the said Owner may, at its discretion, declare this contract, or any portion thereof, forfeited; which declaration and forfeiture shall exonerate,

free, and discharge the said Owner from any and all obligations and liabilities arising under this contract, the same as if this agreement had never been made; and any amount due the Contractor by reason of work done or materials furnished prior to the forfeiture of this contract, shall be retained by the said Owner until the full completion and acceptance of the building upon which said work has been done or said materials furnished, at which time the said Owner, after deducting all costs and expenses occasioned by the default of the said Contractor, shall pay or cause to be paid to him the balance with a statement of all said costs and expenses.

Art. XII. And the Contractor further covenants, promises and agrees that he will make no charge for any extra work performed or materials furnished in and about his contract, and he hereby expressly waives all right to any such compensation, unless he shall first receive an order in writing for the same from the Owner.

Art. XIII. And the Contractor hereby assumes entire responsibility and liability in and for any damage to persons or property during the fulfillment of this contract, caused directly or indirectly by the Contractor, his agents or employees, and the Contractor agrees at his own expense to carry sufficient liability and workman's compensation insurance and to enter in and defend the Owner against, and waive it harmless from loss or annoyance by reason of suits or claims of any kind on account of such alleged or actual damages; or on account of

alleged or actual infringements of patents in regard to any method, device or apparatus, or any part thereof, put in, under, or in connection with this contract, or used in fulfilling the same.

The Contractor hereby further agrees not to assign or sublet in any manner whatsoever, any part or portion of this contract, without the written consent of the Owner, upon the express penalty of forfeiture of the entire contract, in the discretion of the Owner.

Art. XIV. And the Contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanic's claim for lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.

Art. XV. And the Contractor shall at all times, when required by the Owner, before receiving any moneys under this contract, produce satisfactory vouchers and receipts from all employees and material men for work done and materials furnished in and about the erection and completion of the building covered by this contract.

Art. XVI. And any and all work that may be cut out and omitted from this contract, during the progress of the work, shall be allowed by the Contractor at the regular contract price, and shall be adjusted and agreed upon by said parties before the final settlement of their accounts.

Art. XVII. The Owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said work, or

any part thereof, or to any of the materials or other things [231] done, furnished and supplied by the Contractor, used and employed in finishing and completing the same.

Art. XVIII. It is hereby further mutually covenanted, promised and agreed, by and between the said parties, that in the event of any dispute or disagreement hereafter arising between them as to the character, style or portion of the work on said buildings to be done, or materials to be furnished under this contract, or the plans and specifications hereinbefore referred to, or any other matter in connection herewith, the same shall be referred to three arbitrators, one to be chosen by each of the parties hereto, and the third by the two arbitrators so selected, whose decision, or that of a majority of them in the matter, shall be final and binding upon them.

Art. XIX. The Contractor shall, upon request from the Owner, furnish forthwith a bond or bonds in form and substance and with surety satisfactory to the Owner, in the sum of Forty-five Thousand (\$45,000.00) Dollars, conditioned, for the true and faithful performance of this contract on the part of the Contractor.

Art. XX. All negotiations and agreements, oral or written, prior to this agreement, are merged herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except as herein set forth. This agreement cannot be changed, altered or modified in any

respect except by the mutual consent of the parties endorsed hereon in writing and duly executed.

The Contractor has read and fully understands this agreement and the said Contractor hereby certified that before the execution of this agreement he examined all the plans and specifications prepared in connection with the contract.

It is further agreed that the covenants, promises and agreements herein contained shall be binding and final upon the heirs, executors, administrators and successors of the parties hereto.

IN WITNESS WHEREOF, The said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of:

SCANDINAVIAN-AMERICAN BUILD-
ING COMPANY.

By CHARLES DRURY,

Its President.

J. P. SHELDON,

Its Secretary.

BEN OLSON COMPANY,

Contractor.

O. B. OLSON,

President. [232]

Ben Olson Company Exhibit "B."

BEN OLSON COMPANY, a Corporation,
Claimant,

vs.

SCANDINAVIAN-AMERICAN BANK OF TA-
COMA and SCANDINAVIAN BUILDING
CO.,

Respondents.

LIEN CLAIM NOTICE.

Notice is hereby given that on the 27th day of February, 1920, Ben Olson Company, a corporation organized and existing under the laws of the State of Washington, and having its place of business at Tacoma, Pierce County, was, at the request of the Scandinavian-American Bank of Tacoma, and the Scandinavian Building Company, employed to furnish and construct all the plumbing and heating plant for the building, thereafter partially erected by said Bank and Building Company, upon Lots 10, 11 and 12, in Block 1003 of the official plat of "New Tacoma W. T." filed and recorded in the office of the Auditor of said Pierce County, February 3, 1875, of which property the owners and reputed owners were, and are, the said Scandinavian-American Bank of Tacoma, and Scandinavian-American Building Company.

That said Ben Olson Company commenced to furnish the materials for said plumbing and heating of said Building and to perform the labor of installing said materials on or about June 20, 1920, and con-

tinued to furnish said materials and perform said labor until January 15, 1921, when further prosecution of said work was stopped by the abandonment of construction of said building by said owners, and their refusal to further prosecute the same.

That the value of the materials so furnished by said Ben Olson Company was as follows, viz:

1. Materials actually furnished and deposited upon the premises for installation \$30,560.86.

2. Materials procured by said Ben Olson Company to be manufactured specially for said building according to the plans and specifications for the plumbing and heating thereof, and delivered by the manufacturers to said Ben Olson Company, in the City of Tacoma ready for use in said building \$21,293.42. Total materials \$51,854.28.

That the value of the labor performed in the installation of materials in said building was \$2,237.80.

That no part of the value of said materials and labor has been paid except the sum of \$12,425.56, paid on account of materials deposited on the premises and the labor thereon; and

That the said Ben Olson Company claims a lien upon the property above described, for the unpaid portion of the value of said materials and labor, in the sum of \$41,666.52, less the amount of any lien which may be allowed to the Crane Company for materials furnished by it to said Ben Olson Company, for use in said building.

Dated, Tacoma, Washington, April 14, 1921.

BEN OLSON COMPANY,

By O. B. OLSON,

President.

State of Washington,

County of Pierce,—ss.

O. B. Olson, having been first duly sworn on his oath says: I am President of the Ben Olson Company, the claimant above named; I have read the foregoing claim and know the contents thereof, and believe the same to be just.

O. B. OLSON.

Subscribed and sworn to before me this 14th day of April, 1921.

F. E. HILBIBER,

Notary Public for Washington, Residing at Tacoma,
Pierce County. [233]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 25, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [234]

Reply of McClintic-Marshall Company to Cross-complaint of Ben Olson Company.

Comes now complainant, McClintic-Marshall Company, a corporation, by its attorneys Hayden, Langhorne & Metzger, and for reply to the cross-complaint of Ben Olson Company, a corporation, says:

I.

For reply to the 10th paragraph of said cross-complaint this complainant says that it has no knowledge or information sufficient to form a belief as to whether or not between July 1, 1920 and January 15, 1921, it furnished material for the Scandinavian-American Building Company in the sum of \$24,633.97, or any other sum and therefore denies the same and the whole and every part thereof.

II.

For reply to the 11th paragraph of said cross-complaint this complainant says that it has no knowledge or information sufficient to form a belief as to the matters and things therein alleged and therefore denies the same.

III.

For reply to the 12th, 13th, 14th, 15th, 16th, and 17th paragraphs of said cross-complaint this complainant says [235] that it is without knowledge or information sufficient to form a belief as to the matters and things therein alleged and it therefore denies the same.

IV.

For reply to that part of the 18th paragraph which alleges that if cross-complainant had been permitted to proceed with work under its contract it would have made a profit of \$8,029.77, this complainant says it has no knowledge or information sufficient to form a belief and therefore denies the same, and denies that the cross-complainant would

have made a profit as therein alleged of \$8,029.77 or any other sum.

E. M. HAYDEN,
MAURICE A. LANGHORNE,
F. D. METZGER,
Solicitors for Complainant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 25, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [236]

Answer of Scandinavian-American Building Company and F. P. Haskell, Jr., as Receiver, to Cross-complaint of Ben Olson Company.

Come now the defendants, Scandinavian-American Building Company, a corporation, F. P. Haskell, Jr., as receiver of the Scandinavian-American Building Company, a corporation, and J. P. Duke as Supervisor of Banks of the State of Washington, and answer the cross-complaint of the Ben Olson Company, a corporation, as follows:

I.

They deny that the Scandinavian-American Bank of Tacoma on November 1st, 1919, or at any other time intended to construct upon Lots 10, 11 and 12, Block 1003, Map of New Tacoma, W. T., any building for banking purposes or otherwise and that the said Scandinavian-American Bank of Tacoma on February 9th, 1920, or at any other time, acquired title to the said lot Ten, as set forth therein;

and they deny that the said Scandinavian-American Bank of Tacoma, by the expenditure of its own funds, or otherwise, procured the execution of the articles of incorporation of the Scandinavian-American Building Company, or caused, or procured such articles to be filed with the Secretary of the State of Washington or with the Auditor of Pierce County, or otherwise; and they deny that the said Scandinavian-American Bank of Tacoma did procure its director to organize the said corporation or to subscribe to the capital stock thereof [237] in its behalf or otherwise, and they deny that the incorporators of the said company, or the subscribers to the capital stock thereof, in so doing acted as agents of the said Scandinavian-American Bank of Tacoma; and they deny that the said Scandinavian-American Bank of Tacoma transferred to the Scandinavian-American Building Company title to Lots 11 and 12 without consideration, and they deny that the said Scandinavian-American Bank of Tacoma procured the Directors of the Scandinavian-American Building Company, as its own agents, or otherwise, to begin the construction of a building thereon, and they deny that the said defendant, the Scandinavian-American Bank of Tacoma, in any way procured or instigated any contract between the said defendant, Ben Olson Company, and the said Scandinavian-American Building Company, and they deny that any such contract was ever made on behalf of the said Scandinavian-American Bank of Tacoma.

II.

They deny that the said defendant, Ben Olson Company, furnished or delivered to the said premises plumbing or heating material of the value of \$24,633.07 or any other sum whatsoever, and demand strict proof thereof.

III.

They deny that the defendant, Ben Olson Company, procured ready for delivery plumbing or heating materials which are not adapted to use in any other building, of the value of \$8,125.60, or any other sum whatsoever, and demand strict proof thereof.

IV.

They deny that the said defendant procured from the Crane Company or otherwise eighty-six closets complete with fixtures adapted for said building, which are not adapted for any other building, to the value of \$6,132.66, or any other sum whatsoever, and demand strict proof thereof. [238]

V.

They deny that the said defendant, Ben Olson Company, procured from the Crane Company, or otherwise, toilet-room and lavatory materials and fixtures adapted only for use in the said building of the value of \$12,910.76 or any other sum whatsoever, and demand strict proof thereof.

VI.

These defendants have not knowledge or information sufficient to form a belief as to when the said defendant, Ben Olson Company, procured the materials and fixtures not actually delivered on the said

premises, or whether or not such fixtures could have been installed within the time provided in the contract of the said Ben Olson Company, and therefore denies the same.

VII.

These defendants deny that the said Ben Olson Company furnished and performed labor in the construction of the plumbing and heating of the said building of the value of \$2,279.80 or of any other value whatsoever, and demand strict proof thereof.

VIII.

These defendants allege that they have not knowledge sufficient to form a belief as to the sums paid to the said Ben Olson Company upon the said contract price, and therefore deny that only the sum of \$13,425.56 was so paid, and allege that the full contract price was paid.

IX.

These defendants allege that they have not knowledge or information sufficient to form a belief as to the amount necessary to complete the plumbing and heating contract, and therefore deny that the same could have been completed for the sum of \$27,888.34, and that the defendants, Ben Olson Company, would have earned a profit of \$8,049.77, or any other sum under the said contract.

X.

These defendants deny that the said defendants, Ben Olson [239] Company, was at all times ready, willing and able to proceed with the work under said contract, and would have proceeded with and completed the same, and would have earned a profit

of \$8,049.77 and deny that the Scandinavian-American Bank of Tacoma ceased further construction upon the said building and abandoned the same and deny that the said Scandinavian-American Building Company neglected and refused to pay the defendant Ben Olson Company the sum of \$14,-288.82 and deny that said sum was due the defendant under the terms of the said contract, and deny that the said defendant is, or at any time was ready, willing and able to deliver any material to the said Scandinavian-American Building Company, and deny that the said defendant, Ben Olson Company, was ever under any obligations to deliver anything to the said Scandinavian-American Bank of Tacoma, or had any contractual relations with the said Scandinavian-American Bank of Tacoma, with reference to the said building.

XI.

Defendants have not knowledge or information sufficient to form a belief as to whether or not the defendant, Ben Olson Company, filed the lien attached to its cross-complaint, marked Exhibit "B" or as to whether, or not, such lien, if filed, was filed within ninety days after the furnishing of the last material under the said contract, or as to whether or not the said lien was properly verified, and therefore deny the same, and these defendants object to any amendment of the said claim of lien in any manner whatsoever.

XII.

These defendants deny that the defendant, Ben Olson Company, has commenced no action for the

recovery of the sum due it upon the said contract, but allege that the said defendant, Ben Olson Company heretofore and before the filing of the said lien presented its petition to the Court in the above-entitled matter, and recovered specific property under the order of this [240] Court, which said property it is now seeking to include in its said lien.

XIII.

These defendants deny that the defendant, Ben Olson Company, did not know the true relation between the Scandinavian-American Bank of Tacoma, and the said Scandinavian-American Building Company at the time of the execution of the said contract.

XIV.

These defendants deny that the defendant, Ben Olson Company is entitled to recover any interest upon any of its said claims.

XV.

These defendants deny that the defendant, Ben Olson Company is entitled to any attorney's fees whatsoever in the above-entitled matter.

By way of a defense to the bill of complaint of the defendant, Ben Olson Company, these defendants allege:

I.

That the defendant, Ben Olson Company, dealt with the said defendant, Scandinavian-American Building Company, a corporation, as a corporate entity with reference to the matters and things set forth in its bill of complaint herein, and that

the said defendant, Ben Olson Company, thereby estopped itself from denying the corporate entity of the said defendant, Scandinavian-American Building Company, and estopped itself from denying the recitals contained in the said contract, to the effect that the said Scandinavian-American Building Company was erecting the said building on the property therein described and was the owner thereof.

By way of a second defense against the bill of complaint of the defendant, Ben Olson Company, these defendants allege:

I.

These defendants submit to the judgment of this Honorable Court but insist that if the defendant, Scandinavian-American Building Company, a corporation, was, in law, the agent of the [241] Scandinavian-American Bank of Tacoma, in the erection of the said building, as set forth by the defendant Ben Olson Company, that nevertheless, the said defendant, Ben Olson Company, has no lien against the said property in that the said defendant Ben Olson Company, in the furnishing of such materials and supplies to be used in the construction thereof did not mail to the said Scandinavian-American Bank of Tacoma notice, in writing, stating substantially that it had commenced the delivery of such materials and supplies for use therein, and that a lien might be claimed for the same, as it was required to do under the provisions of Section 1133 of Remington's Codes and Statutes

of Washington, as a prerequisite to the filing of such lien.

As a third defense against the bill of complaint of the defendant, Ben Olson Company, these defendants allege:

I.

That the defendant, Ben Olson Company, has, with knowledge of the facts, filed its lien as set forth in its bill of complaint herein, and has included therein nonlienable items, and has filed the said lien for an amount grossly in excess of the amount due it in truth and in equity, and that by reason thereof, the said defendant, Ben Olson Company thereby forfeited its right to any lien and its right to any equity at the hands of the Court.

As a fourth defense to the bill of complaint of the defendant, Ben Olson Company, these defendants allege:

I.

That the defendant, Ben Olson Company, by filing its claim with the liquidators of the said defendant, Scandinavian-American Bank of Tacoma, as set forth in its bill of complaint herein has estopped itself from proceeding upon its said bill of complaint herein.

As a fifth defense to the bill of complaint of the defendant, Ben Olson Company, these defendants allege: [242]

I.

That this Court has no jurisdiction in the above-entitled matter to allow the sum of \$8,029.77, as a claim against the property and assets of the said

Scandinavian-American Bank of Tacoma, in liquidation.

As a sixth defense against the bill of complaint of the defendant, Ben Olson Company, these defendants allege:

I.

That in the written contract made between the defendants and the cross-complainant, Ben Olson Company, and the defendants, Scandinavian-American Building Company, by its terms provides that the said defendants, Ben Olson Company, thereby agreed to waive any and all right to any materialman's lien or lien against the said premises, and thereby expressly agreed not to file any claim or lien whatsoever against the said premises, and thereby the said defendant, Ben Olson Company, estopped itself in this action from filing any such lien or from attempting to enforce the same.

And for a counterclaim against the defendant, Ben Olson Company, a corporation, these defendants allege:

I.

That the defendant, Ben Olson Company, by the filing of its lien as set forth in its bill of complaint herein and by filing its said bill of complaint herein, has passed the title to the property, materials and supplies which it alleges therein that it had ready for delivery at its storehouse to the said defendant, Scandinavian-American Building Company, and to the defendant, F. P. Haskell, Jr., as receiver thereof, and that the defendants are entitled to the delivery of the said property and to the sale thereof

in the above-entitled matter, or to judgment against the said defendant for the value thereof.

WHEREFORE, defendants pray that the prayer of the cross-complainant, Ben Olson Company, herein be in all respects denied.

F. D. OAKLEY,

KELLY & MacMAHON,

Attorneys for Defendants. [243]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 15, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [244]

Answer of Far West Clay Company to Amended and Supplemental Bill of Complaint and Counterclaim.

Comes now the Far West Clay Company, a corporation, one of the defendants in the above-entitled action and for answer to the amended and supplemental bill of complaint of the McClintic-Marshall Company, a corporation, therein,—

I.

Defendant alleges that it is without knowledge as to the facts, matters and things set forth in paragraph 14 of the said amended and supplemental bill of complaint, and it therefore denies the same and each and every part thereof.

II.

Defendant alleges that it is without knowledge as to the facts, matters and things set forth in paragraph 15 of the said amended and supplemental

bill of complaint, and it therefore denies the same and each and every part thereof.

III.

Defendant alleges that it is without knowledge as to the facts, matters and things set forth in paragraph 16 of the said amended and supplemental bill of complaint, and that it therefore denies the same and each and every part thereof.

IV.

Defendant alleges that it is without knowledge of the facts, matters and things set forth in paragraph 17 of the said amended and supplemental bill of complaint, and it therefore denies the same and each and every part thereof, except the allegation therein contained to the effect that the complainant in said bill filed its claim of lien, as therein set forth.

V.

Defendant denies that its lien, claim, right, title or interest in the premises referred to in paragraph 18 of the amended and supplemental bill of complaint, is junior or subsequent or inferior to the lien of complainant.

VI.

Defendant denies that the sum of Fifteen Thousand Dollars (15,000) is a reasonable attorney's fee, as set forth and alleged in paragraph 19 of the said amended and supplemental bill of complaint. [245]

And for a further answer to the said amended and supplemental bill of complaint and as a counterclaim against the complainants therein and all

of the defendants named and set forth therein, with the exception of this defendant, defendant alleges:

I.

That it and the defendant the Scandinavian-American Building Company, and the Scandinavian-American Bank of Tacoma, are corporations, duly organized and existing under the laws of the State of Washington, and are citizens of the said State, and are residents of the Southern Division of the Western District of the State of Washington.

II.

Defendant further alleges that the defendants Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, constitute a copartnership doing business in Tacoma, Washington, under the name and style of Tacoma Millwork Supply Company, and all of said named defendants with the exception of Hattie Davis Tennant are citizens of the State of Washington, and the said Hattie Davis Tennant is a citizen of the State of California.

III.

Defendant further alleges that the defendant G. Wallace Simpson is a citizen and resident of the State of Missouri.

IV.

Defendant further alleges that in this action, and during the pendency thereof, Forbes P. Haskell,

one of the defendants therein, by an order of the above-entitled court duly and [246] regularly made, was appointed receiver of the Scandinavian-American Building Company, one of the defendants herein, and that he thereafter qualified, and is now acting as the receiver thereof, and that the said Forbes P. Haskell, as receiver, has been made a party defendant in this action, by an order of the Court duly made therein, and that by the said order leave has been granted to all of the parties in this action to sue him, and make him a party defendant to their counterclaims.

V.

Defendant further alleges that at the time of the beginning of this action, Claude P. Hay, was the duly appointed, qualified and acting State Bank Commissioner of the State of Washington, and that the defendant, Forbes P. Haskell, was the Deputy State Bank Commissioner of the State of Washington, and that both of the said parties were then and at all times hereinafter mentioned were citizens and residents of the State of Washington; that they had charge of the property and assets of the Scandinavian-American Bank of Tacoma, which was insolvent, and were charged with the supervision, handling, control and disposition of its assets, including the right to sell and dispose of any and all of its property with the title thereto, being vested by law in them; that since the beginning of this action the statutes of the State of Washington, with respect to the banking affairs of this state, have been changed, and that the control of the

banking operations of the said State have been vested in the Director of Taxation and Examination, who at present is E. L. Farnsworth, and that in pursuance of the said statutes the said E. L. Farnsworth appointed John P. Duke, Supervisor of Banking of the State of Washington, and that he in turn has appointed the defendant, Forbes P. Haskell, Special Deputy Supervisor of Banking of the State of Washington, liquidating the Scandinavian-American Bank of Tacoma, which is insolvent, who still is, and now has charge of the management [247] and control of the affairs of the Scandinavian-American Bank of Tacoma, with power to handle and dispose of all of the property under the direction of the said John P. Duke, and the said Forbes P. Haskell is now acting as such Special Deputy Supervisor of Banking of the State of Washington liquidating the Scandinavian-American Bank, aforesaid, and the said Forbes P. Haskell, as Special Deputy Supervisor as aforesaid, John P. Duke and E. L. Farnsworth, under the laws of the State of Washington, are charged with the disposition and handling of all of the property, business and affairs of the said Scandinavian-American Bank, and the liquidation thereof.

VI.

Defendant further alleges that the defendants, Savage-Scofield Company, Puget Sound Iron & Steel Works, E. E. Davis & Company, St. Paul & Tacoma Lumber Company, Henry Mohr Hardware Company, Inc., Hunt & Mottet, Edward Miller Cornice & Roofing Company, Washington Brick,

Lime & Sewer Company, United States Machine & Engineering Company, Colby Star Manufacturing Company, Tacoma Shipbuilding Company, and Ben Olson Company, are all corporations, organized and existing under the laws of the State of Washington, and citizens of said State. [248]

V.

Defendant further alleges that the defendant Otis Elevator Company is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and a citizen of said State, but has been admitted to do business in the State of Washington by virtue of having complied with the laws of the State of Washington, relative to foreign corporations.

VI.

Defendant further alleges that the defendant Crane Company is a corporation, duly organized and existing under and by virtue of the laws of the State of Illinois and a citizen of the said State, but has been admitted to do business in the State of Washington by virtue of having complied with the laws of said State of Washington relative to foreign corporations.

VII.

Defendant further alleges that the defendant H. C. Greene, doing business as H. C. Greene Iron Works, the defendant, J. D. Mullins, doing business as J. D. Mullins Bros., that S. O. Matthews and Frank L. Johns are partners doing business under the name of City Lumber Agency, that Carl Gebbers and Fred S. Haines are copartners doing busi-

ness under the firm name and style of Ajax Electric Company, that Robert M. Davis and Frank C. Neal, are copartners doing business under the firm name and style of Davis & Neal, that S. J. Pritchard and C. H. Graves are copartners doing business as P. & G. Lumber Company, that Morris Kleiner is doing business as Liberty Lumber & Fuel Company, and that J. A. Soderberg is doing business as West Coast Monumental Company, and Theodore Hedlund is doing business as the Atlas Paint Company, and that they are all citizens of the State of Washington and residents of the Southern Division of the Western District of Washington. [249]

VIII.

Defendant further alleges that the defendants F. W. Madsen, Gustaf Jonasson, N. A. Hanson, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed. Lindberg, Joe Tikalsky, F. Menten, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Anfang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey and W. E. Morris are each and every one of them citizens of the State of Washington,

and residents of the Southern Division of the Western District of Washington.

IX.

Defendant further alleges that the matter and amount in the above-entitled action exceed, exclusive of cost, the sum or value of \$3,000.

X.

That at all the times hereinafter mentioned, the defendant, Scandinavian-American Building Company, a corporation, was and now is the owner and reputed owner of lots ten (10), Eleven (11) and twelve (12) in block one thousand and three (1003), as the same are shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," which was filed for record in the office of the auditor of Pierce County, Washington Territory, February 3d, 1875. [250]

XI.

That heretofore and on or about the 1st day of November, 1919, the said Scandinavian-American Bank of Tacoma, was the owner and in possession of Lots eleven (11) and twelve (12) in Block One Thousand and Three (1003), in said City of Tacoma, as the same are shown and designated upon a certain Plat entitled "Map of New Tacoma, W. T.," which was filed for record in the office of the Auditor of said Pierce County, February 3, 1875, with the building located thereon which it used as its bank building.

XII.

That thereupon, and on or about said 1st of November, 1919, said Scandinavian-American Bank

of Tacoma, desired and intended to construct upon the premises above described, and upon the adjoining lot ten (10) in said block 1003, a larger and more elaborate and costly building for its banking offices and other purposes and for that purpose and intent, it, on or about February 9, 1920, acquired from one Charles Drury, one of its directors, and his wife, the said lot 10, who conveyed said lot 10 to said Scandinavian-American Building Company for a consideration paid by said Scandinavian-American Bank of Tacoma.

XIII.

That prior thereto, and on or about November 18th, 1919, and in pursuance of its purpose to erect said building on said premises, the said Scandinavian-American Bank of Tacoma, by the expenditure of its own funds, procured certain of its Board of Directors, to wit: J. E. Chilberg and Gustaf Lindberg, to execute Articles of Incorporation of a corporation, to be known and designated as "Scandinavian-American Building Company," with a capital stock of Two Hundred Thousand Dollars, with powers as therein set forth; and caused and procured said Articles of Incorporation to be filed in the office of the Secretary of the State of Washington and in the office of the Auditor of said Pierce County. And said Articles of Incorporation designated as directors of said Scandinavian-American Building Company, for the first six months after [251] its incorporation, J. E. Chilberg, O. S. Larson, Jafet Lindeberg, Gustaf Lindberg, Charles Drury, James R. Thompson and

George G. Williamson, all of whom were directors and who included all of the directors of said Scandinavian-American Bank of Tacoma.

XIV.

That upon the filing of said Articles of Incorporation, said Scandinavian-American Bank of Tacoma, further procured certain of its said directors to organize said corporation, and to subscribe for the capital stock thereof, and their respective names, but not on their own behalf, but on the behalf of said Scandinavian-American Bank of Tacoma, and solely as its agents and trustees.

XV.

That thereafter, and on or about the 10th day of March, 1920, the said Scandinavian-American Bank of Tacoma, conveyed said Lots 11 and 12, Block 1003, New Tacoma, to said Scandinavian-American Building Company, by deed, without the payment of any consideration therefor by said Building Company, although the value of said premises was at least One Hundred Thousand Dollars.

XVI.

That thereupon, the said Scandinavian-American Bank of Tacoma further procured its said directors, as Directors of said Scandinavian-American Building Company, but in truth and in fact, as its own agents, and trustees, and in its behalf, to enter upon the construction of a sixteen-story steel and concrete bank and office building upon said premises, at an estimated cost of more than One Million Dollars, without any other assets or property than its capital stock, which was of no actual value, and

the said lots, upon which there was a mortgage lien of upward of Seventy Thousand Dollars. [252]

XVII.

That thereupon the said Scandinavian-American Bank of Tacoma procured its said directors to enter into a contract with the defendant, Far West Clay Company, hereinafter set forth, in the name of the Scandinavian-American Building Company, as the contracting party, but that the said contract was really in behalf of said Scandinavian-American Bank of Tacoma, and the builders' materials hereinafter referred to were furnished in pursuance of the said contract, and that at the time this defendant entered into the said contract with the Scandinavian-American Building Company, hereinafter referred to, and furnished the builders' materials hereinafter referred to, and at the time it filed its notice of lien hereinafter referred to it did not know of the acts set forth in the preceding five paragraphs of this counterclaim, and did not know that the Scandinavian-American Bank of Tacoma had caused the said Scandinavian-American Building Company to be incorporated in its interest, or that it caused the said contract hereinbefore referred to, to be made in its interest, in the name of the Scandinavian-American Building Company, or that it had a claim, or any interest, equitable or otherwise, in the said lots hereinbefore described, or in the said Scandinavian-American Building Company.

XVIIA.

Defendant further alleges that prior hereto, and prior to May 28, 1921, it duly presented to Forbes P.

Haskell, as Receiver of the Scandinavian-American Building Company, its claim against said company for the builders' materials hereinbefore set forth, said claim being in writing and duly verified as required, and that at said time it presented to Forbes P. Haskell, as Deputy Supervisor of Banking of the State of Washington, liquidating the Scandinavian-American Bank of Tacoma, its claim for the said builders' materials, hereinbefore referred to, said claim being in writing, in accordance with the requirements of the said Deputy Supervisor of Banking, and setting forth the facts creating the liability of the said bank for the said builders' materials hereinbefore set forth. [253]

XVIII.

Defendant further alleges that on or about the 28th day of February, 1920, it entered into a written contract with the defendant, Scandinavian-American Building Company, a copy of which is hereto attached, marked Exhibit "A," and made a part hereof.

XIX.

That thereafter and in accordance with the terms of the said contract, this defendant, as requested from time to time, by the said Scandinavian-American Building Company, furnished and delivered to it for use in the construction of the building hereinafter referred to, certain builders' materials, consisting of builders' tiling and blocks made of clay for partitions, flooring beam covers, etc., referred to and set forth in the said contract at and for the prices therein set forth, which prices were then the

fair and reasonable value of the said builders' materials.

XX.

That the said builders' material consisted of 35,798 skew building blocks, referred to in the said contract as "skews," which were then of the fair and reasonable value of 25.3 cents each which price the said Scandinavian-American Building Company agreed in said contract to pay therefor.

XXI.

That the said builders' material further consisted of 18,225 key building blocks, which were then of the fair and reasonable value of 21.4 cents each, which price the said Scandinavian-American Building Company agreed in said contract to pay therefor; also 43,545 large "inter" building blocks, which were then of the fair and reasonable value of 25.3 cents each, which price the said Scandinavian-American Building Company agreed in said contract to pay therefor. [254]

XXII.

That the said builders' material further consisted of 6,819 beam covers, which were then of the fair and reasonable value of 20.6 cents each, which price the said Scandinavian-American Building Company agreed in said contract to pay therefor; that in addition this defendant furnished 28,897 small "inter" building blocks, which were then of the fair and reasonable value of 12.7 cents each, which price the said Scandinavian-American Building Co., agreed in said contract to pay therefor.

XXIII.

That the agreed price and fair and reasonable value of all of the said builders' materials was the sum of \$29,048.58, and that although payment of all of the said sum was demanded from the said defendant, Scandinavian-American Building Company, after the same became due, yet no part thereof has been paid except the sum of \$6843.07, which together with the allowance of \$40.17, makes a total credit of \$6883.24; that all of the said builders' materials were furnished and were used in the construction of certain steel store and office building, which was then being constructed by the said Scandinavian-American Building Co. on the lots and premises hereinbefore described, and that all of the said lots and premises are necessary for the convenient use and occupation of the said building.

XXIV.

Defendant further alleges that it began to furnish the said builders' materials on August 5th, 1920, and ceased to furnish and deliver the same on January 13th, 1921, and that by the terms of the said contract the amount due thereon, became due and payable within thirty days from the receipt by said building of said materials, and the date of the receipt of the last thereof was on January 13th, 1921. [255]

XXV.

That by the terms of the said contract this defendant agreed to deliver the said builders' materials F. O. B. the cars of its factory, to wit, at Clay City, Washington, at which place and on said

cars the same were all delivered at and within the dates hereinbefore set forth.

XXVI.

Defendant alleges that it has ever stood ready and willing and has offered to deliver all the balance of the said builders' materials needed in the construction of the said building, but that said defendant has declined and refused to receive any more thereof.

XXVII.

Defendant attaches hereto as Exhibit "B," an invoice showing the amount of the said builders' material and the date of the delivery thereof, and defendant alleges that it is entitled to interest on the various sums, set forth in said Exhibit "B," from and after thirty days from the delivery of the said builders' materials, as shown therein.

XXVIII.

Defendant further alleges that within ninety days after it ceased to furnish the said builders' materials, hereinbefore referred to, and on the 24th day of January, 1921, it filed a notice of lien in writing claiming a lien on the said building, hereinbefore referred to, and the lots on which it is situated, as hereinbefore described, for the amount due to it for the said builders' materials, and the said notice of lien was duly filed and recorded in the office of the auditor of Pierce County, Washington, on the 24th day of January, 1921, duly verified by the oath of the claimant, and a copy thereof is hereto attached, marked Exhibit "C," and is made a part thereof.

XXIV.

That said notice of lien claimed a lien on the said building and premises hereinbefore described, for the amount due it on the said builders' materials, under and by virtue of Section 1134 of Rem. Codes & Stat. of the State of Washington.

XXV.

That there is now due to this defendant for the said builders' materials the sum of \$22,165.34, and interest, as aforesaid, and that this defendant has been compelled to employ an attorney to foreclose and enforce its lien, and protect and preserve its interests arising thereunder; that under and by virtue of Section 1134 of Rem. Codes & Stat. of the State of Washington, it is entitled to a reasonable attorney's fee therefor, which it alleges and avers is the sum of \$1,500.00.

XXVI.

Defendant alleges that the complainant in the above-entitled action and each of the defendants therein, who are hereinbefore named and whose names are set forth in full in the caption or title to this answer, claim to have mortgages, liens or judgments, on the lots and premises hereinbefore described, and the building thereon, or claim to have some right, title or interest in and to said premises, or some part thereof, but defendant alleges that the said lien, judgment, right, title or claim is subject, secondary and subordinate to the lien of this defendant, hereinbefore set forth. That the Scandinavian-American Bank defendant claims to own the land and premises hereinbefore described and to

hold two mortgages thereon all of which are subject and subordinate to aforesaid lien.

WHEREFORE defendant prays that the complainant in the above-entitled action, and each of the said defendants therein, who are hereinbefore named as defendants in said action and whose names are set out in the caption herein to which reference is for their names to save repetition, may be required to answer the counterclaim [257] of this defendant, and set forth the nature, character and extent of their claims, demands, liens, judgments, or interests in and to the said building and premises, or any part thereof, and that upon the hearing hereof may each of their liens, judgments, right and title in and to the said building and premises, and any part thereof, be adjudged and decreed to be subject, secondary and subordinate to the lien of this defendant, hereinbefore set forth, and

Upon the hearing hereof may this defendant have judgment against the Scandinavian - American Building Company and the Scandinavian-American Bank of Tacoma for the sum of \$22,165.34 and interest as aforesaid, as well as an attorney's fee of \$1500, for foreclosing and enforcing this lien, and for its necessary costs and disbursements herein, and

May it be adjudged and decreed that this defendant has a valid first lien on the said building and the premises hereinbefore described, and may the said lien be foreclosed, and may the said building and premises be decreed to be sold for the satis-

faction of the judgment so found due to this defendant, according to the practice of this court, and

May the proceeds of the sale be applied to the satisfaction of the judgment of this defendant.

Further, this defendant prays that said defendants hereinbefore named and referred to and all persons claiming under them or either of them, subsequent to the filing and recording of your defendant's lien in the office of the auditor of Pierce County, Washington, either as purchasers or encumbrancers, lienors, or otherwise, may be barred and foreclosed of all right, claim or equity of redemption in the said premises and every part thereof, and that it may have a judgment and execution against the defendant, Scandinavian-American Building Company, and the Scandinavian-American [258] Bank of Tacoma for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of its judgment. That this defendant or any other parties to this suit may become a purchaser at said sale, and that the officer executing the sale shall execute and deliver the necessary conveyances to the purchaser or purchasers, and that said purchaser or purchasers at said sale, may be let into the possession of said premises.

That this defendant may have such other further and general relief in the premises as equity may require.

R. S. HOLT,
Attorney for Defendant, Far West Clay Company.
[259]

Exhibit "A."

THIS AGREEMENT, made this 28th day of February, 1920, by and between Scandinavian-American Building Company, a corporation, hereinafter called the "Owner," party of the first part, and Far West Clay Company of Tacoma, Washington, hereinafter called the "Contractor," party of the second part,

WITNESSETH:

WHEREAS, the said Scandinavian-American Building Company, Owner, is about to begin the erection of a sixteen-story building on the property situated in Pierce County, Washington, described as follows: Lots Ten (10), Eleven (11) and Twelve (12) in Block One Thousand Three (1003), as shown and designated upon a certain plat, entitled "Map of New Tacoma, W T.," of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Penn., architect, and

WHEREAS, the said Far West Clay Company of Tacoma, Washington, is desirous of entering into a contract with the said Scandinavian-American Building Company, Owner, to furnish

10" Skews and Inters	at	25.3¢	each	f.	o.	b.	cars	Clay	City, Wash.
10" Keys	"	21.4¢	"	"	"	"	"	"	"
Beam Covers	"	20.6¢	"	"	"	"	"	"	"
4 x 12-12 Partition Tile	"	9.5¢	"	"	"	"	"	"	"
6 x 12-	"	12.5¢	"	"	"	"	"	"	"

There will be approximately 120,000 square feet of floor tile and approximately 110,000 square feet

of partition tile, to be made according to detail agreed upon,

under and subject to all terms, limitations and conditions contained in the plans and specifications hereinbefore referred to.

NOW THIS AGREEMENT WITNESSETH,

ART. I. That in consideration of the agreements herein contained, the Owner agrees to pay to the Contractor, net cash, within thirty days from date of receipt of materials, said payments, however, in no way lessening the total and final responsibility of the Contractor. No payment shall be construed or considered as an acceptance of any defective work or improper material.

ART. III. The Contractor hereby agrees that time shall be considered the very essence of this contract, and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the Contractors are working. And the said Contractor further covenants and agrees to perform the work promptly, without notice on the part of anyone, so as to complete the building at the earliest possible moment.

ART. V. The said Contractor shall complete the several portions and [260] the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz.:

The said Contractor agrees to commence shipment of the aforementioned material within three months from the date of the contract, and to complete shipment of the entire order within five months.

ART. VI. Should the Contractor be delayed in the progress of the work under this contract by strike, or common carrier, or casualty beyond the control of the Contractor, then the time herein designated for the completion of said work shall be extended for a period equivalent to the time lost, but no such allowance shall be made unless a claim therefor is presented in writing by the Contractor within the occurrence of such delay.

ART. XIII. The Contractor hereby further agrees not to assign or sublet in any manner whatsoever, any part or portion of this contract, without the written consent of the Owner, upon the express penalty of forfeiture of the entire contract, in the discretion of the Owner.

ART. XV. And the Contractor shall at all times, when required by the Owner, before receiving any moneys under this contract, produce satisfactory vouchers and receipts from all employees and materialmen for work done and materials furnished in and about the erection and completion of the building covered by this contract.

ART. XX. All negotiations and agreements, oral or written, prior to this agreement, are merged herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except as herein set forth. This agreement cannot be changed, altered or modified in any respect, except by the mutual consent of the parties endorsed hereon in writing and duly executed.

The Contractor has read and fully understands this agreement and the said Contractor hereby cer-

tified that before the execution of this agreement he examined all the plans and specifications prepared in connection with the contract.

And it is further agreed that the covenants, promises and agreements herein contained shall be binding and final upon the heirs, executors, administrators and successors of the parties hereto.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

SCANDINAVIAN-AMERICAN BUILD-
ING CO.

By CHARLES DRURY,

Its President.

J. SHELDON,

Its Secretary.

By FAR WEST CLAY COMPANY,

Contractor.

By E. R. WHEELER,

President. [261]

Exhibit "B."SCANDINAVIAN-AMERICAN BUILDING COMPANY IN AC-
COUNT WITH THE FAR WEST CLAY COMPANY.

			Dr.	Cr.
Aug.	5, 1920	Invoice rendered	712.70	
Sept.	2 "	By check		712.70
"	11 "	Invoice rendered	399.29	
"	30 "	" "	576.87	
Nov.	13 "	By check		976.16
"	6 "	Invoice rendered	510.05	
"	8 "	" "	417.45	
"	10 "	" "	582.91	
"	11 "	" "	428.43	
"	12 "	" "	417.45	
"	13 "	" "	417.45	
"	15 "	" "	417.45	
"	16 "	" "	417.45	
"	17 "	" "	697.75	
"	18 "	" "	423.78	
"	19 "	" "	424.04	
Dec.	27 "	By check		5,154.21
"	7 "	Allowance		40.17
"	4 "	Invoice rendered	881.89	
"	7 "	" "	571.78	
"	8 "	" "	421.06	
"	9 "	" "	580.22	
"	10 "	" "	506.00	
"	11 "	" "	607.96	
"	13 "	" "	570.55	
"	15 "	" "	427.57	
"	17 "	" "	570.30	
"	18 "	" "	571.53	
"	20 "	" "	427.57	
"	21 "	" "	419.22	
"	16 "	" "	702.83	
"	22 "	" "	596.07	
"	22 "	" "	571.78	
"	22 "	" "	571.06	
"	23 "	" "	427.57	
"	23 "	" "	428.33	
"	23 "	" "	428.43	

"	28	"	"	"	420.50
"	28	"	"	"	427.57
"	28	"	"	"	571.78
"	29	"	"	"	573.80
"	29	"	"	"	571.78
"	30	"	"	"	558.80
"	30	"	"	"	572.63
"	31	"	"	"	571.78
"	31	"	"	"	428.08
"	31	"	"	"	573.80
"	31	"	"	"	428.08
"	31	"	"	"	422.76
"	31	"	"	"	427.57
Jan.	3, 1921		"	"	572.03
"	3	"	"	"	428.64
"	3	"	"	"	571.78
"	4	"	"	"	571.78
"	4	"	"	"	422.51
"	5	"	"	"	428.08
"	5	"	"	"	428.43
"	7	"	"	"	428.08
"	7	"	"	"	573.80
"	10	"	"	"	522.83
"	13	"	"	"	426.90

Total Debits	29,048.58
Credits	6,883.24
Bal. due	22,165.34

[262]

SUMMARY.

3982 Flat Skew Building Blocks	25.3¢	1,007.45
31816 Ind " " "	25.3¢	8,049.45
18225 Key " "	21.4¢	3,900.15
43545 Large Inter " "	25.3¢	11,016.89
28897 Small " " "	12.7¢	3,669.92
6819 Beam Covers	20.8¢	1,404.72

Total	29,048.58
Credits	6,883.24
Balance due	22,165.34

Exhibit "C."**NOTICE OF LIEN.**

NOTICE IS HEREBY GIVEN That the FAR WEST CLAY COMPANY, a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, hereinafter called the claimant, claims a lien on that certain bank and office building or structure, which is now being erected on lots numbered Ten (10), Eleven (11) and Twelve (12), in Block numbered One Thousand and Three (1003), in that part of the City of Tacoma known as New Tacoma, according to the map and plat of New Tacoma, as filed in the office of the auditor of Pierce County, Washington; said lots and block being situate in the County of Pierce, and State of Washington; said lien is also claimed on the said lots, as the lots on which the said building is located and being constructed; that said lien is claimed for the price and value of certain builders' materials, which were furnished by claimant to the Scandinavian-American Building Company, at its request, for use in the construction of the said building, and which were so used; that the said builders' materials consisted of building tiling of various kinds, made of clay, which were furnished by claimant to said Scandinavian-American Building Company, under a contract by the terms of which claimant agreed to furnish the tiling for use in construc-

tion of the said building, of the kind and at the prices following, to wit:

10" Skews and Inters	at 25.3¢ each
10" Keys	" 21.4¢ "
Beam Covers	" 20.6¢ "
4 x 12-12 Partition Tile	" 9.5¢ "
6 x 12-12 " "	" 12.5¢ "

which prices the said Scandinavian-American Building Company agreed to pay for the said tiling; the said tiling, by the terms of said contract, to be made according to details to be agreed upon; that said prices and sums above set forth were the fair and reasonable value of the said tiling; that in pursuance of the said contract, on August 5, 1920, claimant began to furnish the said builders' materials for the said building, and that on January 13th, 1921, it ceased to furnish the same, and the said day is the day on which it furnished the last of the said builders' materials, furnished by it; that under the said contract, claimant, between the dates aforesaid, furnished the said builders' materials, in the amounts and of the price as follows: [263]

3892 Flat Skew Building Blocks	25.3¢.....	1,007.45
31816 Ind " " "	25.3¢.....	8,049.45
18225 Key " "	21.4¢.....	3,900.15
43545 Large Inter " "	25.3¢.....	11,016.89
28897 Small " "	12.7¢.....	3,669.92
6819 Beam Covers " "	20.6¢.....	1,404.72
		<hr/> 29,048.58

The said tiling or builders' materials were made according to the details agreed upon; that the total value and price of the said builders' materials so furnished is the sum of \$29,048.58, as above set forth; that no part of the sum due for the said builders' materials has been paid, except the sum of \$712.70, paid on September 2, 1920, the sum of

\$976.16, paid on November 13, 1920, and the sum of \$5154.21, paid on December 27th, 1920, and an allowance or credit of \$40.17; that said credit and payments amount to the total sum of \$6883.24; that there is now a balance due to claimant, for the said builders' materials, amounting to the sum of \$28,165.34, which sum is unpaid; that the Scandinavian-American Building Co., hereinbefore referred to, is a corporation, and is now, and was at all times herein mentioned, the owner and reputed owner of the lots and premises hereinbefore described, together with the building or structure being erected thereon, claimant therefore claims a lien on the said building or structure, and on the said lots, as aforesaid, for the said sum of \$22,165.34.

FAR WEST CLAY COMPANY,

By E. R. WHEELER,

Its President,

Claimant.

State of Washington,
County of Pierce,—ss.

E. R. Wheeler, being first duly sworn says: I am the President of the Far West Clay Company, claimant in the above and foregoing notice of lien, and I make this affidavit for and in its behalf; I have read, and heard read, the above and foregoing notice or claim of lien, and I know the contents thereof, and I believe the same to be just.

E. R. WHEELER.

Subscribed and sworn to before me this 19th day of January, 1921.

[Seal]

R. S. HOLT,

Notary Public in and for the State of Washington,
Residing at Tacoma.

Filed by R. S. Holt. January 24, 1921. Lien Record 15, page 636, at 3.47 P. M. C. A. Campbell, County Auditor, Pierce County, Wash. By A. L. Kelly, Deputy. [264]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 10, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [265]

**Answer of E. E. Davis & Company to Amended
and Supplemental Bill of Complaint.**

To the Honorable E. E. CUSHMAN, Judge of the
District Court of the United States for the
Western District of Washington, Southern Di-
vision:

Now come your orator E. E. Davis & Company,
a corporation, as defendant, and for this its answer
to complainant's amended and supplemental bill of
complaint herein admits, denies and alleges as fol-
lows, to wit:

I.

Answering paragraph I of complainant's amended
and supplemental bill, your orator states, that it
has not sufficient knowledge or information to enable
it to form a conclusion as to the truth of the facts

therein stated and it therefore denies each and every allegation in said paragraph I contained.

II.

Answering paragraphs II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, and XIII of complainant's amended and supplemental bill your orator on information and belief admits each and every allegation contained in said paragraphs.

III.

Answering paragraph XIV of said amended and supplemental bill your orator states that it has not sufficient knowledge or information to enable it to form a belief as to the allegations therein contained and it therefore denies said allegations and each of them.

IV.

Answering paragraph XV of said amended and supplemental bill your orator admits that during the year 1920, the said complainant delivered on cars at Tacoma, Washington, certain structural [266] steel, but it denies each and every other allegation in said paragraph contained.

V.

Answering paragraph XVI of said amended and supplemental bill your orator admits that approximately 2201 tons of the steel delivered by the complainant as aforesaid was used in the erection of the building and on the premises in said bill described.

VI.

Answering paragraph XVII of said amended and supplemental bill your orator states that it has not sufficient knowledge or information to enable it to

form a conclusion as to the truth of the facts therein stated so it denies each and every allegation in said paragraph XVII contained.

VII.

Answering paragraph XVIII of said amended and supplemental bill your orator states that it has not sufficient knowledge or information to enable it to form a belief as to the truth of the facts therein contained with reference to the defendants other than this defendant and it therefore denies all of said allegations and it further specifically denies all the allegations in said paragraph relating to this defendant except that this defendant claims and has a lien and interest in and to the premises in said bill described.

VIII.

Answering paragraph XIX and XX of said amended and supplemental bill your orator states that it has not sufficient knowledge or information to enable it to form a belief concerning the allegations in said paragraphs contained and it therefore [267] denies the said allegations and each of them.

Cross-complaint as Against Complainant and Bill of Complaint as Against Defendants Herein Other Than This Cross-complainant.

E. E. Davis & Company, a corporation, organized and existing under and by virtue of the laws of the State of Washington and a citizen of the said state brings this cross-bill of complaint against complainant McClintic-Marshall Co. and bill of

complaint against the Scandinavian-American Building Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and a citizen of said state, Scandinavian-American Bank, a corporation, organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant, and Ann Davis, all citizens of the State of Washington, save Hattie Davis Tennant who is a citizen of the State of California, copartners doing business under the name and style of Tacoma Millwork Supply Company, G. Wallace Simpson, a citizen of the State of Missouri, P. Claude Hay, State Bank Commissioner for the State of Washington, and a citizen of said State of Washington, and Forbes P. Haskell, Deputy State Bank Commissioner for the State of Washington and receiver of and for the defendant Scandinavian-American Building Company, and a citizen of the State of Washington, Savage-Scotfield Company, a corporation, organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Puget Sound Iron & Steel Works, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, St. Paul & Tacoma Lumber Company, a corporation organized and existing under and by virtue

of the laws of the State of Washington and a citizen of said state, Far West Clay Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Henry, Mohr Hardware Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Hunt & Mottet, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Edward Miller Cornice & Roofing Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Washington Brick Lime & Sewer Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Otis Elevator Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and a citizen of said state, and duly admitted to do business in the state of Washington by virtue of having complied with the laws of said State of Washington relative to foreign corporations, United States Machine & Engineering Company, a corporation organized and [268] existing under and by virtue of the laws of the State of Washington and a citizen of said state, Colby Star Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state, Tacoma Shipbuilding Company, a corporation organized and

existing under and by virtue of the laws of the State of Washington and a citizen of said state, Crane Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois and a citizen of that state, but admitted to do business in the State of Washington by virtue of having complied with the laws of said State of Washington, relative to foreign corporations, Ben Olson Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and a citizen of said state, H. C. Greene doing business as H. C. Green Iron Works, citizen of the State of Washington, Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company, both citizens of the State of Washington, S. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency, both citizens of the State of Washington, J. D. Mullins doing business as J. D. Mullins Bros., a citizen of the State of Washington, S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company, both citizens of the state of Washington, Morris Kleiner doing business as Liberty Lumber & Fuel Company, a citizen of the State of Washington, J. A. Soderberg doing business as West Coast Monumental Company, a citizen of the State of Washington, Theodore Hedlund doing business as Atlas Paint Company, a citizen of the State of Washington, F. W. Madsen, Gustaf Jonasson, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain,

D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short; Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey, and W. E. Morris, all of whom are citizens and residents of the State of Washington, and Frederick Webber, a citizen and resident of the State of Pennsylvania, and thereupon your orator complainant says as follows:

I.

Your orator is now and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Washington and is now and was at all said times a citizen of said state. [269]

II.

On information and belief defendant Scandinavian-American Bldg. Co. is now and was at all times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the State of Washington and a citizen of said state

and a resident of the Southern Division of the Western District of the State of Washington.

III.

On information and belief the defendant Scandinavian-American Bank is now and was at all times hereinafter mentioned organized and existing under and by virtue of the law of the State of Washington and a citizen of said state and a resident of the Southern Division of the Western District of the State of Washington.

III-A.

On information and belief claimant McClintic-Marshall Company is a corporation and a citizen of the State of Pennsylvania.

IV.

On information and belief the defendants Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, constitute a copartnership, doing business in Tacoma, Washington, under the name and style of Tacoma Millwork Supply Company and all of said named defendants with the exception of Hattie Davis Tennant, are citizens of the State of Washington, and the said Hattie Davis Tennant is a citizen of the State of California. [270]

V.

On information and belief the defendant G. Wallace Simpson is now and was at the time of

the institution of this suit a citizen of the State of Missouri.

VI.

That defendant Claude P. Hay was at the time of the filing of the amended and supplemental bill herein, ever since then has been and now is the duly appointed, qualified and acting State Bank Commissioner of and for the State of Washington. That the defendant Forbes P. Haskell was at the time of the filing of said amended and supplemental bill, ever since then has been and now is the duly appointed, qualified and acting Deputy State Bank Commissioner for the State of Washington and the duly appointed qualified and acting receiver of the said Scandinavian-American Building Company and that the said Claude P. Hay and Forbes P. Haskell during all of said times were and are now citizens of the Southern Division of the Western District of Washington.

VII.

On information and belief the defendants Savage-Scofield Company, Puget Sound Iron & Steel Works, St. Paul and Tacoma Lumber Company, Far West Clay Company, Henry Mohr Hardware Company, Inc., Hunt & Mottet, Edward Miller Cornice & Roofing Company, Washington Brick Lime & Sewer Company, United States Machine & Engineering Company, Colby Star Manufacturing Company, Tacoma Shipbuilding Company, and Ben Olson Company, are all now and were at all times herein stated corporations, organ-

ized and existing under the laws of the State of Washington and citizens of said state. [271]

VIII.

On information and belief the defendant Otis Elevator Company is now and was at all times herein stated a corporation, duly organized and existing under and by virtue of the laws of the State of New Jersey and a citizen of said state, but has been admitted to do business in the State of Washington by virtue of having complied with the laws of the State of Washington relative to foreign corporations.

IX.

On information and belief the defendant Crane Company is now and was at all times herein stated a corporation, duly organized and existing under and by virtue of the laws of the State of Illinois and a citizen of said state, but has been admitted to do business in the State of Washington by virtue of having complied with the laws of said State of Washington relative to foreign corporations.

X.

On information and belief the defendant H. C. Greene, doing business as H. C. Greene Iron Works, the defendant J. D. Mullins, doing business as J. D. Mullins Bros., S. O. Matthews and Frank L. Johns, a copartnership doing business under the name of City Lumber Agency, Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company, Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of

Davis & Neal, S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company, Morris Kleiner doing business as Liberty Lumber & Fuel Company, J. A. Soderberg, doing business as West Coast Monumental Company, Theodore Hedlund doing business as the Atlas Paint Company, are all citizens of the State of Washington [272] and residents of the Southern Division of the Western District of Washington.

XI.

On information and belief the defendants F. W. Madsen, Gustaf Jonasson, N. A. Hanson, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, Sherman Wells, Carl J. Gerringier, George Gerringier, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey and W. E. Morris are each and every one of them citizens of the State of Washington, and residents of the Southern Division of the Western District of Washington.

XII.

On information and belief defendant Frederick

Webber was at all of said times and is now a citizen and resident of the State of Pennsylvania.

XIII.

Your orator represents and shows to the Court that the matter and amount involved in the above-entitled action and also the claim of your orator exceeds exclusive of interest and costs the sum or value of \$3000.00. [273]

XIV.

That ever since prior to the institution of this suit the defendant Scandinavian-American Building Company, a corporation, has been and still is the owner of Lots 10, 11 and 12 in Block 1003 as the same are shown and designated upon a certain plat entitled Map of New Tacoma, W. T., which plat was filed on record in the office of the Auditor of Pierce County, W. T., February 3rd, 1875.

XV.

That on or about the 28th day of February, 1920, your orator entered into a contract in writing with the defendant Scandinavian-American Building Company by the terms of which it was provided that your orator would receive on board cars, erect and paint one coat of graphite or equal paint, all structural steel used in the construction of a building then proposed to be erected on the lots hereinbefore mentioned. Said work to be performed according to certain plans and specifications prepared by Frederick Webber, architect, and the said steel to be furnished by the said owner. That by the said contract it was also provided that the

said owner would pay your orator for the work performed as aforesaid the sum of \$19.00 per ton of the steel erected, the payments of which would be made to your orator in monthly installments, each installment to be 75% of the estimated value of the steel erected at the date of said estimate and the balance to be paid within thirty to sixty days from the acceptance of the work by the architect. That a true and correct copy of said contract is hereto attached and marked Exhibit "A." [274]

XVI.

That thereafter, to wit, on or about the 14th day of June, 1920, the plaintiff entered upon the performance of the work contemplated by the said contract and continued in the performance of the same thereafter until the 15th day of January, 1921. That as the said work progressed your orator was paid by said owner from time to time on monthly estimates for 75% of the estimated value of the steel then erected in compliance with the terms of the said contract amounts aggregating the sum of \$13,865.82; that on the 31st day of December, 1920, there became due from the said owner and payable to your orator for work performed under the terms of said contract during the said month of December the sum of \$10,425.94, that your orator on January 4th, 1921, duly presented to the said owner its estimate in the form and manner previously used and accepted, showing your orator to be entitled to the said sum of \$10,425.94, for work performed by it during said month of December, and demanded payment there-

for; that the owner then approved said estimate but failed and refused and still fails and refuses to pay the said sum or any portion thereof; and the said owner thereafter, to wit, on or about the 17th day of January, 1921, wholly abandoned the said building construction, because it was wholly insolvent, refused payment to your orator for this reason, and through its building superintendent informed your orator of said facts and directed your orator to cease its erection work on said building and to remove all its equipment from the said building and premises; that your orator thereupon, and for said reasons, and others hereinafter mentioned ceased all its labors on said building and thereafter treated and considered the said contract as rescinded. [275]

XVII.

That while it was provided by Article XIV of the contract herein set out that your orator would waive any claim or mechanics' liens, your orator hereby states that such waiver was induced and obtained solely by the representations and assurances made to your orator at the time of the negotiations for said contract, which representations and assurances were made by the said owner and by others for it made in the presence and hearing of the said owner and with its full knowledge and consent, which representations and assurances were to the following effect:

a. That the said owner then had on hand the sum of \$400,000.00 which it intended to and would

expend in the first construction work of the said building.

b. That it had made definite and final arrangements to borrow by mortgage on the premises to be covered by the construction work from a party ready, willing and able to loan the same the sum of \$600,000.00 which sum would be used in financing the completion of the construction of said building and that the said sum would be amply sufficient for said purpose, and

c. That all contracts for material and labor that would enter into the construction of the said building would contain the same lien waiver provisions.

That had these representations and assurances been true the building would have been fully financed and all labor and material would have been paid for and the necessity for any claims or liens would have been removed.

XVIII.

That your orator believing in the truth of the said representations and assurances and fully relying thereon and not otherwise and being solely induced thereby agreed to the waiver [276] article in said contract, but that in truth and in fact the said representations and assurances were false and untrue and were known to be false and untrue by the owner at the time they were made; that the falsity of the said representations and assurances was not discovered by your orator until the 17th day of January, 1921. That by reason of the foregoing facts the owners herein became thereby and still are estopped to set up the said

article of waiver of mechanic's lien as against your orator.

XIX.

That because of the facts herein mentioned the contract between the said owner and your orator became and was rescinded and thereafter, to wit, on or about the 25th day of April, 1921, your orator notified the said owner of his election to treat said contract as rescinded; a true and correct copy of which notice is hereto attached and marked Exhibit "B."

XX.

That the reasonable value of your orator's labor in the performance of its work in the erection and painting of the steel put in place by it as herein set forth was and is the sum of \$40,949.75, of which it has been paid by the said owner the sum of \$13,-865.82 and no more, leaving a balance due to your orator for the work so performed by it the sum of \$27,083.93.

XXI.

That between the 6th day of October, 1920, and the 15th day of January, 1921, your orator on written requests and orders of and from the said owner so to do performed additional and extra work in connection with the erection of said steel on said building the reasonable value of which additional and extra work was and is [277] the sum of \$3,056.52, of which but \$518.79 has been paid to your orator, although demand has been made therefore to the said owner, leaving a balance due your orator on this item in the sum of \$2,537.73.

XXII.

That under a written order and request therefor by the said owner dated December 28th, 1920, your orator performed certain necessary additional and correction labor in the preparation of certain portions of the said structural steel for fitting the same into the said building, all of which steel so corrected was by your orator thereafter set into the said building, the reasonable value of which said labor was and is \$722.03, no part of which has been to your orator paid, although demand for the same has been by your orator made on said owner. That a true and correct copy of said written order is hereto attached marked Exhibit "C."

XXIII.

That your orator also shows that all of the labor performed by it as aforesaid was upon the building situated on the lots hereinbefore described, said lots and building being owned by the defendant Scandinavian-American Building Company, and all of said lots were necessary for the construction and convenient use of the said building; that the total balance due to your orator from said owner for all of the work hereinabove mentioned exclusive of interest and costs is the sum of \$30,343.69.

XXIV.

That your orator being without any security for the payment of the amount due to it from the said owner as hereinabove [278] mentioned on the 8th day of April, 1921, duly prepared, filed and recorded with the County Auditor of and for Pierce County, Washington, said county being the one in

which the above-mentioned property is situated, its claim of lien against the said premises and the whole thereof, which claim of lien was duly verified by oath, said lien being filed under and by virtue of the mechanic's lien law, which was at all of said times and still is in full force and effect in said state. Said lien was by the Auditor of and for said county recorded at page 64 in volume 16 of the lien records of and for said county, a true and correct copy of which lien is hereto attached marked Exhibit "D."

XXV.

That your orator is not now prosecuting, neither has it ever prosecuted any action either at law or in equity or any proceeding whatsoever for the recovery of the debt claimed by it as hereinabove set out or any portion thereof, that it has been compelled to employ the services of attorneys and counsel to protect and preserve its interest in the preparation and filing of the said lien claim and in the further protection and preservation of its interests in this proceeding; that the reasonable charge and fee for said services is \$7500.00.

XXVI.

Your orator further shows that the defendants Scandinavian-American Bank, a corporation, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma

Millwork Supply [279] Company, P. Claude Hay, as State Bank Commissioner, Forbes P. Haskell as Deputy State Bank Commissioner and as receiver of Scandinavian-American Building Company, Savage Scofield Company, a corporation, Puget Sound Iron & Steel Works, a corporation, St. Paul & Tacoma Lumber Company, a corporation, Far West Clay Company, a corporation, Henry Mohr Hardware Company, Inc., a corporation, Hunt & Mottet, a corporation, Edward Miller Cornice & Roofing Company, a corporation, Washington Brick Lime & Sewer Company, a corporation, Otis Elevator Company, a corporation, United States Machine & Engineering Company, a corporation, Colby Star Manufacturing Company, a corporation, Tacoma Shipbuilding Company, a corporation, Crane Company, a corporation, and Ben Olson Company, a corporation, H. C. Greene doing business as H. C. Greene Iron Works, Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company, S. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency, J. D. Mullins doing business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company, Morris Kleiner doing business as Liberty Lumber & Fuel Company J. A. Soderberg doing business as West Coast Monumental Company, Theodore Hedlund doing business as Atlas Paint Company, F. W. Madsen, Gustaf Jonasson, N. A. Hansen, A. J. Van Bus-

kirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, [280] C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey, and W. E. Morris and Frederick Webber, Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal, and complainant McClintic-Marshall Company, a corporation, respectively, have or claim to have some right, title, lien or interest in and to said premises, but whatever the nature of said right, title, interest or claim may be if any they have, the same is junior, subsequent and inferior to the lien of your orator.

WHEREFORE YOUR ORATOR PRAYS:

1. That the said McClintic-Marshall Company and each of the defendants hereinabove named be required to make answer respectively unto all and singular the matters hereinbefore stated and charged as fully and as particularly as if the same were herein expressed, and they thereunto particularly interrogated, but not under oath, answer under oath being hereby expressly waived.

2. That your orator may have a judgment against the said Scandinavian-American Building Company for the full sum of \$30,343.69, together with interest thereon at the rate of six per cent per annum from the 15th day of January, 1921, until paid together with the further sum of \$7,500.00 as attorneys' fees for service in this cause and for all your orator's costs and expenses herein incurred or to be incurred and that the same may be adjudged a first and valid lien against the lands and premises hereinabove described; that said lands and premises and building thereon be decreed to be sold in satisfaction of the amount so found due to your orator [281] according to law and the practice of this Court and that the proceeds of such sale be applied in the payment of the costs of these proceedings and sale, of the said sum of \$7,500.00 as attorney's fees and your orator's claim amounting to \$30,343.69 with interest thereon as hereinabove specified.

3. That the complainant McClintic-Marshall Company and each of the defendants herein and all persons claiming under them or either of them subsequent to the filing and recording of your orator's lien as herein stated, either as purchasers or encumbrancers, lienors, or otherwise may be barred and foreclosed of all right, claim or equity of redemption in the said premises and every part thereof; that your orator or any other party to this suit may be a purchaser at said sale and that the officer executing the sale herein shall execute and deliver the necessary conveyances to such pur-

chaser or purchasers and that the purchaser or purchasers at said sale be given possession of said premises, and,

4. That your orator may have such other and further orders, judgments and relief in the premises as may to your Honor seem just, equitable and proper.

MAY IT PLEASE YOUR HONOR to grant to your orator writs of subpoena to be directed to the said complainant and to each of the aforesaid defendants to wit: Scandinavian-American Building Company, a corporation, Scandinavian-American Bank, a corporation, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant, and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company, G. Wallace Simpson, P. Claude Hay, as State Bank [282] Commissioner for the State of Washington, and Forbes P. Haskell, as Deputy State Bank Commissioner for the State of Washington and as Receiver of the Scandinavian-American Building Company, Savage Scofield Company, a corporation, Puget Sound Iron & Steel Works, a corporation, St. Paul & Tacoma Lumber Company, a corporation, Far West Clay Company, a corporation, Henry Mohr Hardware Company, Inc., a corporation, Hunt & Mottet, a corporation, Edward Miller Cornice & Roofing Company, a corporation, Washington Brick Lime & Sewer Com-

pany, a corporation, Otis Elevator Company, a corporation, United States Machine & Engineering Company, a corporation, Colby Star Manufacturing Company, a corporation, Tacoma Shipbuilding Company, a corporation, Crane Company, a corporation, and Ben Olson Company, a corporation, H. C. Greene doing business as H. C. Greene Iron Works, Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company, S. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency, J. D. Mullins doing business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves copartners doing business as P. & G. Lumber Company, Morris Kleiner doing business as Liberty Lumber & Fuel Company, J. A. Soderberg, doing business as West Coast Monumental Company, Theodore Hedlund doing business as Atlas Paint Company, F. W. Madsen, Gustaf Jonasson, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcelino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short; and Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis

& Neal, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey and W. E. Morris and Frederick Webber, therein and thereby commanding them and each of them at a certain time and under a certain penalty therein to be named to be and appear before your Honor in this Honorable Court, then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to stand to and abide and perform such other and further orders or decrees as to your Honor shall seem meet and just.

E. E. DAVIS & COMPANY, a Corporation.

By JAMES W. REYNOLDS,

Attorneys for Defendant and Cross-complainant.

PETERS & POWELL,

Of Counsel. [283]

Exhibit "A."

THIS AGREEMENT, made this 28th day of February, A. D. 1920, by and between Scandinavian-American Building Company, a corporation, hereinafter called the "Owner," party of the first part, and E. E. Davis Co., a corporation organized and existing under the laws of the State of Washington, hereinafter called the "Contractor," party of the second part,

WITNESSETH:

WHEREAS, the said Scandinavian-American

Building Company, Owner, is about to begin the erection of a — story building on the property situated in Pierce County, Washington, described as follows: Lots Ten (10), Eleven (11) and Twelve (12) in Block One Thousand Three (1003), as shown and designated upon a certain plat entitled "Map of New Tacoma, W. T." of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Penn., architect, and

WHEREAS, the said E. E. Davis Co., a corporation, is desirous of entering into a contract with the said Scandinavian-American Building Company, Owner, to receive on board cars and erect all structural steel; also to give all steel one coat of graphite, or equal paint; also to store material in yard, if necessary, at contractor's expense, as per your estimate of February 21, 1920. There is to be approximately 2,000 ton of steel to be erected, under and subject to all terms, limitations and conditions contained in the plans and specifications herebefore referred to.

NOW THIS AGREEMENT WITNESSETH:

ART. I. That in consideration of the agreements herein contained, the Owner agrees to pay to the Contractor, the sum of nineteen dollars (\$19.00) per ton in installments as hereinafter stated. Said payments, however, in no way lessening the total and final responsibility of the Contractor. No payment shall be construed or considered as an acceptance of any defective work or improper material.

Although it is distinctly understood and agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible, yet for the convenience of the Contractor, it is stipulated that payments shall be made as follows:

75% monthly, to be paid in cash, of the estimated value of steel erected, and the balance of 25% to be paid within thirty (30) to sixty (60) days from the acceptance of work by the architect.

ART. II. The said Contractor hereby covenants, promises and agrees to do all of the aforesaid work to be furnished and finished agreeably to the satisfaction, approval and acceptance of the Architect of said building and to the satisfaction, approval and acceptance of the said Owner, according to the true intent and meaning of the drawings, plans and specifications made by said Architect, which said plans, drawings and specifications are to be considered as part and parcel of this agreement, as fully as if they were at length herein set forth, and the said Contractor is to include and do all necessary work under his contract, not particularly specified, but required to be furnished and done in order to fully complete and fulfill his contract to the satisfaction of the said Architect and Owner aforesaid.

ART. III. The Contractor hereby agrees that time shall be considered the very essence of this contract, and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the Contractors are working. And

the said Contractor further covenants and agrees to perform the work promptly, without notice on the part of anyone, so as to complete the building at the earliest possible moment. [284]

ART. IV. The Contractor further covenants and agrees to observe carefully the progress of the work upon the entire building, without notice from anyone, and to procure drawings at least two weeks prior to executing the work, and to perform his portion of the work upon said building at the earliest proper time for such work, and to be responsible for all loss occasioned directly and indirectly by any lack of knowledge upon his part, as to the proper time to perform his work.

ART. V. The said Contractor shall complete the several portions and the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz.: Steel to be erected as fast as the delivery of steel will allow.

ART. VI. Should the Contractor be delayed in the progress of the work under this contract by strike, or common carrier, or casualty wholly beyond the control of the Contractor, then the time herein designated for the completion of said work shall be extended for a period equivalent to the time lost, but no such allowance shall be made unless a claim therefor is presented in writing by the Contractor within twenty-four hours of the occurrence of such delay.

ART. VII. And in case of default in any part of the said work within the times and periods above specified, the Contractor hereby promises and agrees

to pay the Owner, and the Owner may deduct from any amount coming to the Contractor the sum of — Dollars for each and every day's delay until the completion of the work, not in the nature of a penalty, but in the nature of liquidated damages for the delay caused to the Owner in the completion of the work.

ART. VIII. Any imperfect workmanship or other faults which may appear within one year after the completion of said work, and in the judgment of said Architect arising out of improper materials or workmanship, shall, upon the direction of said Architect, be amended and made good by, and at the expense of, said Contractor, and in case of default so to do, the Owner may recover from said Contractor, the cost of making good the work.

ART. IX. The Contractor hereby agrees to remove the dirt and rubbish accumulating on the premises, caused by the construction of his work, at such time or times as he may be instructed by the Owner or his representatives and if not removed promptly by the Contractor, the Owner is hereby authorized to remove the same at the expense of the said Contractor, and to deduct the cost thereof from any balance that may be due and owing him.

ART. X. And should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or of materials of the proper quality or fail in any respect to prosecute the work with promptness and diligence or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being cer-

tified by the Architect of the Owner, the latter shall be at liberty after two days' written notice to the Contractor to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the Architect or the Owner shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon and to employ any other person or persons to finish the work and provide the materials therefor; and in case of such discontinuance of the employment of the Contractor, the latter shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time if the unpaid balance of the amount to be paid under [285] this contract shall exceed the expense incurred by the Owner in finishing the work said excess shall be paid *b* the Owner to the Contractor; but if said expenses shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expenses incurred by the Owner as herein provided, either for furnishing the materials or for finishing the work and any damage incurred through such default shall be itemized and certified by the Owner, which itemized statement shall be conclusive upon the Contractor.

ART. XI. And the Owner reserves the right, that if there be any omission or neglect on the part of the said Contractor of the requirements of this agreement and the drawings, plans and specifications, the said Owner may, at its discretion, declare this contract, or any portion thereof, forfeited; which declaration and forfeiture shall exonerate, free and discharge the said Owner from any and all obligations and liabilities arising under his contract, the same as if this agreement had never been made; and any amount due the Contractor by reason of work done or materials furnished prior to the forfeiture of this contract, shall be retained by the said Owner until the full completion and acceptance of the building upon which said work has been done or said materials furnished, at which time the said Owner, after deducting all costs and expenses occasioned by the default of the said Contractor, shall pay or cause to be paid to him the balance with a statement of all said costs and expenses.

ART. XII. And the Contractor further covenants, promises and agrees that he will make no charge for any extra work performed or materials furnished in and about his contract, and he hereby expressly waives all right to any such compensation, unless he shall first receive an order in writing for the same from the Owner.

ART. XIII. And the Contractor hereby assumes entire responsibility and liability in and for any damage to persons or property during the fulfillment of this contract, caused directly or indirectly by the Contractor, his agents or employees, and the

Contractor agrees at his own expense to carry sufficient liability and workmen's compensation insurance and to enter in and defend the Owner against, and save it harmless from loss or annoyance by reason of suits or claims of any kind on account of such alleged or actual damages; or on account of alleged or actual infringements of patents in regard to any method, device or apparatus, or any part thereof, put in, under, or in connection with this contract, or used in fulfilling the same.

The Contractor hereby further agrees not to assign or sublet in any manner whatsoever, any part or portion of this contract, without the written consent of the Owner, upon the express penalty of forfeiture of the entire contract, in the discretion of the Owner.

ART. XIV. And the Contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanic's claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.

ART. XV. And the Contractor shall at all times, when required by the Owner, before receiving any moneys under this contract, produce satisfactory vouchers and receipts from all employees and materialmen for work done and materials furnished in and about the erection and completion of the building covered by this contract.

ART. XVI. And any and all work that may be cut out and omitted from this contract, during the

progress of the work, shall be allowed by the Contractor at the regular contract price, and shall be adjusted and agreed upon by said parties before the final settlement of their accounts. [286]

ART. XVII. The Owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part thereof, or to any of the materials or other things done, furnished and supplied by the Contractor, used and employed in finishing and completing the same.

ART. XVIII. It is hereby further mutually covenanted, promised and agreed, by and between the said parties, that in the event of any dispute or disagreement hereafter arising between them as to the character, style or portion of the work on said buildings to be done, or materials to be furnished under this contract, or the plans and specifications hereinbefore referred to, or any other matter in connection herewith, the same shall be referred to three arbitrators, one to be chosen by each of the parties hereto, and the third by the two arbitrators so selected, whose decision, or that of a majority of them in the matter, shall be final and binding upon them.

ART. XIX. The Contractor shall, upon request from the Owner, furnish forthwith a bond or bonds in form and substance and with surety satisfactory to the Owner, in the sum of Nineteen Thousand no/100 Dollars, conditioned for the true and faithful performance of this contract on the part of the Contractor. Bond, however, to be paid for by Owner.

ART. XX. All negotiations and agreements, oral or written, prior to this agreement, are merged herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except as herein set forth. This agreement cannot be changed, altered or modified in any respect except by the mutual consent of the parties endorsed herein in writing and duly executed.

The Contractor has read and fully understands this agreement and the said Contractor hereby certifies that before the execution of this agreement he examined all the plans and specifications prepared in connection with the contract.

And it is further agreed that the covenants, promises and agreements herein contained shall be binding and final upon the heirs, executors and successors of the parties hereto.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

SCANDINAVIAN-AMERICAN BUILD-
ING CO.,

By CHARLES DRURY,
Its President.

J. SHELDON,
Its Secretary.

E. E. DAVIS,
Contractor. [287]

Exhibit "B."**NOTICE OF RESCISSION OF CONTRACT.**

To Scandinavian-American Building Company,
Tacoma, Washington.

Gentlemen:

We assume that from what has transpired between your company and us with reference to the abandonment of the construction work on your bank building at 11th Street and Pacific Avenue in Tacoma, Washington, you understand that the contract between your company and us for construction work on said building has long since been rescinded, but if such is not your understanding, we write to say to you that we have elected to rescind, and we do now rescind the said contract because of the breach thereof by your company and because of the abandonment by you of the construction work provided for in said contract and further because of the false and fraudulent representation and statements made to us by you and by others in your presence and hearing and with your knowledge and consent; which false and fraudulent statements and representations induced us to sign the said contract.

E. E. DAVIS & COMPANY.

(Corporate Seal) (Signed) By E. B. DAVIS,

Pres. [288]

Exhibit "C."

SCANDINAVIAN-AMERICAN BUILDING CO.

Phone Main 2036.

Tacoma, Washington.

December 28, 1920.

E. E. Davis & Company,

Contractors & Steel Erectors,

Scandinavian-American Bank Bldg.,

Tacoma, Washington.

Gentlemen:

On or about March 5, 1920, the Scandinavian-American Building Company entered into a written agreement with McClintic, Marshall Company of Pittsburgh, Pa., whereby the said McClintic, Marshall Company guaranteed to deliver the steel frame for the above named bank building in the City of Tacoma not later than June 5, 1920. The McClintic, Marshall Company failed to make delivery of said steel until on or about the 10th day of October, 1920, and by reason of such delay and the failure on the part of the McClintic, Marshall Company, the Scandinavian-American Building Company have refused to pay the said McClintic, Marshall Company a certain amount of money claimed as liquidated damages by reason of the breach of said contract and, as a result thereof, the McClintic, Marshall Company, we understand, have notified you that they will not pay for any further alterations or corrections which may have to be made in the steel frame.

Now, this letter is to advise you that you will please have any necessary changes made or errors corrected in order to have said steel frame put up in a workmanlike manner and that you will keep a strict accounting of said errors and changes which may be chargeable to the McClintic, Marshall Company under their contract so that the amount may be properly entered upon the books of the Building Company and a true accounting made with McClintic, Marshall Company, and this letter will be your guarantee that any such changes made or errors corrected will be paid for by the Scandinavian-American Building Company and charged to the McClintic, Marshall Company on their books.

Very truly yours,

SCANDINAVIAN-AMERICAN BUILD-
ING COMPANY,

(Signed) By CHARLES DRURY,
President.

(Signed) J. SHELDON,
Secretary. [289]

Exhibit "D."

E. E. DAVIS & COMPANY, a Corporation,
Claimant,

vs.

SCANDINAVIAN-AMERICAN BUILDING
COMPANY, a Corporation,
Owner.

NOTICE OF CLAIM OF LIEN.

NOTICE IS HEREY GIVEN, That on the 14th day of June, 1920, the above named claimant, E. E.

Davis & Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, at the special instance and request of the above named owner, the Scandinavian-American Building Company, a corporation duly organized and existing under and by virtue of the laws of the State of Washington (said request and employment being made through its officers Charles Drury, president, and J. Sheldon, secretary), commenced to perform labor in the erection of the steel in and upon a certain building then being constructed and thereafter continued to be constructed upon certain lots in Tacoma in Pierce County, Washington, that is to say, upon and covering the whole of lots 10, 11 and 12 in Block 1003, as the same are shown and designated upon a certain plat entitled Map of New Tacoma, W. T., which plat was filed of record February 3rd, 1875, and is now of record in the office of the Auditor of Pierce County, Washington; of all of which property the said Scandinavian-American Building Company was at all times during the year 1920 and still is the owner or reputed owner. That after the commencement of the performance of the labor above-mentioned the said E. E. Davis & Company continued in the performance of the same until the cessation thereof which occurred on January 15th, 1921.

That the labor performed by E. E. Davis & Company under the employment of the said owner as hereinabove mentioned was and is of the reasonable value of \$40,949.75, no part of which has been paid to the claimant excepting the sum of, \$13,865.82,

leaving a balance due to the said claimant for labor performed on said building the sum of \$27,083.93, for which amount claimant hereby claims a lien on the building and premises herein described.

That at the request of the said Scandinavian-American Building Company made through its said officers and through its agent Sherman Wells who was then its building superintendent and building inspector in charge of the construction of the said building, the said E. E. Davis & Company on the 5th day of November, 1920, commenced to perform labor on extra work in the construction of said building situate on lots in Tacoma in Pierce County, Washington, that is to say, on the whole of lots 10, 11 and 12 in Block 1003 as the same are shown and designated upon a certain plat entitled Map of New Tacoma, W. T., which plat was filed of record February 3rd, 1875, and is now of record in the office of the Auditor of Pierce County, Washington; of all of which property the said Scandinavian-American Building Company was throughout [290] the year 1920 and still is the owner or reputed owner. That the said claimant thereafter continued in the performance of said labor on said building until it ceased the performance of the same on the 15th day of January, 1921. That the reasonable value of the labor performed by this claimant upon the said building under the employment herein last before stated was and is the sum of \$3,056.52, of which sum no part has been paid, excepting the sum of \$518.79, leaving a balance due to this claimant for labor on said building the sum of \$2,537.73, for which amount

this claimant hereby claims a lien upon the building and premises herein described.

That at the instance and request of the said Scandinavian-American Building Company through its president, Charles Drury, and its secretary, J. Sheldon, the said claimant, E. E. Davis & Company on the 4th day of January, 1921, commenced to perform labor in alteration and correction of the steel work on the construction of the said building situated on lots in Tacoma in Pierce County, Washington, that is to say, upon the whole of Lots 10, 11 and 12 in Block 1003, as the same are shown and designated upon a certain plat entitled Map of New Tacoma, W. T., which plat was filed of record February 3d, 1875, and is now of record in the office of the Auditor of Pierce County, Washington, of all of which property the said Scandinavian-American Building Company was throughout the year 1920 and still is the owner or reputed owner; That the performance of the labor by the said E. E. Davis & Company on the said building and premises under the employment last aforesaid so continued until the cessation thereof which occurred on the 15th day of January, 1921. That the labor performed by the said E. E. Davis & Company under the employment last above-mentioned, upon the building and premises hereinbefore described was and is of the reasonable value of \$722.03, no part of which has been paid and for which amount this claimant hereby claims a lien on the building and premises herein described.

That the aggregate sum due and unpaid to the said E. E. Davis & Company for labor performed by it on the building situate upon the premises herein described and owned by the said Scandinavian-American Building Company is the sum of \$30,343.69, for which sum together with interest thereon at the rate of six per cent per annum from the 15th day of January, 1921, until paid, the said E. E. Davis & Company claims a lien upon the property herein described and the whole thereof.

This notice of lien claim is rendered necessary and is hereby made and filed because of the errors and omissions in the notice of lien claim by this claimant filed on the 22d day of January, 1921, and recorded at page 634 in record 15 of the lien records of and for Pierce County, Washington.

E. E. DAVIS & COMPANY.

(Corporate Seal) Attest: E. E. DAVIS,

Secretary.

By E. B. DAVIS,

President,

Claimant. [291]

State of Washington,

County of King,—ss.

E. B. Davis, being duly sworn, says: I am the President of the above-named claimant, E. E. Davis & Company, a corporation; I have heard the foregoing claim read and know the contents thereof and believe the same to be just.

[Seal]

(Signed) E. B. DAVIS,

Subscribed and sworn to before me this 7th day of April, 1921.

JAMES W. REYNOLDS,
Notary Public in and for the State of Washington,
Residing at Seattle.

State of Washington,
County of King,—ss.

James W. Reynolds, being duly sworn, says: I am the attorney of and for the claimant, E. E. Davis & Company, a corporation above named; I have heard the foregoing claim read, know the contents thereof and believe the same to be just.

[Seal] (Signed) JAMES W. REYNOLDS.

Subscribed and sworn to before me this 7th day of April, 1921.

DWIGHT D. HARTMAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

No. 593132. Filed by E. E. Davis & Co. Apr. 8, 1921, Lien Record 16, page 64, at 3:52 P. M. C. A. Campbell, County Auditor, Pierce County, Wash. By A. L. Kelly, Deputy. Mail to 303 Burke Bldg., Seattle, Wn. 2:10.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 20, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [292]

Answer of Far West Clay Company to Cross-Complaint of John P. Duke and Scandinavian-American Bank of Tacoma.

Comes now the Far West Clay Company, a corporation, one of the defendants in the above-entitled action, and answering the cross-complaint of John P. Duke, Supervisor of Banks in the State of Washington, in charge of the liquidation of the Scandinavian-American Bank of Tacoma, and the Scandinavian-American Bank of Tacoma,—

I.

Defendant has no knowledge whether the Penn Mutual Life Insurance Company endorsed the note, or sold, or assigned, or transferred the mortgage, as set forth in paragraph 18 of said cross-complaint, to John P. Duke, Supervisor of Banking in the State of Washington; and it has no knowledge whether he is now the owner and holder thereof. It denies that its lien is inferior, subject to or subordinate to the lien of said note and mortgage and that the sum of seven thousand dollars (\$7000.00), or any greater sum than two thousand dollars (\$2000.00), is a reasonable attorney's fee for foreclosing said mortgage.

And this defendant further alleges that the said cross-complainants have no right to foreclose the mortgage set forth and referred to in said first cross-complaint in this action, for the reason that the mortgage only relates to and embraces a part of the real estate involved in the amended and supplementary complaint herein, and involved in this

action; and that there is a misjoinder of causes of action in said cross-complaint, and for the further reason that neither J. E. Chilberg nor Annie M. Chilberg, the makers of the note referred to in the said cross-complaint, and the makers of the mortgage therein referred to, are parties to this action, and without them, as this defendant is informed and believes the said cross-complaints have no right to foreclose this note and mortgage in this action, and this Court is without jurisdiction to entertain this action; and for the further reason that there is a defect of parties defendant herein, because the said Chilbergs should be made parties to an action foreclosing the said mortgage.

III.

And this defendant further alleges that prior to the execution of the mortgage therein referred to, the said lots 11 and 12, in block 1003, were owned by the Scandinavian-American Bank of Tacoma, subject to certain mortgages thereon, which the said Scandinavian-American Bank of Tacoma had assumed and agreed to pay, which mortgages secured its own debts and obligations; that thereafter said real estate was conveyed by the said Scandinavian-American Bank of Tacoma to the said J. E. Chilberg, without any consideration whatever, merely for the purpose of having the said J. E. Chilberg and Annie M. Chilberg, his wife, who were interested in the said Bank, execute the mortgage referred to in said cross-complaint, instead of the said Bank itself doing so; which mortgage was given for money used to pay the mortgage or mort-

gages already on said lots, and that upon the execution of the said mortgage, the said Chilberg and wife, reconveyed the said lots to the said Bank by warranty deed; that while the said note and mortgage were executed by the said Chilbergs, yet, as a [293] matter of fact, it was well understood between all the parties, that the said note was the debt and obligation of the said Bank, and not that of the said Chilberg and wife, who had no interest in the said property, and who were mere dummies for the said Bank.

IV.

Defendant further alleges that when the said Chilberg and wife conveyed the said lots to the said Bank, and it became the owner thereof, the said note and mortgage, referred to in the said cross-complaint, were its own debt and obligation, and that when the said lots were sold to the Scandinavian-American Building Company by the said Bank, the said note and mortgage referred to in the said cross-complaint, remained and continued to be the debt and obligation of the said Bank, and were such at the time it suspended business, and at the time John P. Duke, Supervisor of Banking in the State of Washington, took charge of the said Bank, and they were such at the time of the alleged purchase thereof by the said John P. Duke, and the assignment thereof to him, as set forth in the said cross-complaint.

[Inserted at the end of Paragraph IV as part thereof, under order of court made on Oct. 19 1921, in *purance* of stipulation of counsel.—E. E. C.]

That the said lots were sold and conveyed to the said Building Company by the said Bank by a deed with covenants of general warranty and that the said Bank, then and there, in consideration of the promise of said Building Company to pay for said lots, expressly assumed said mortgage debt and promised the said Building Company to pay the same.

V.

Defendant further alleges that during the year 1920, the Scandinavian-American Bank of Tacoma formed the plan of erecting a building on lots 11 and 12 in block 1003, referred to in the first cross-complaint, and also on lot 10 adjoining the same; but the building planned by it was so costly and expensive that the said Bank could not erect the same without investing in it a sum in excess of thirty per cent of its capital, surplus and undivided profits, which would be in violation of the statutes of the State of Washington, unless the consent of the Bank Examiner thereto was obtained; that the consent of the Bank Examiner thereto could not be obtained.

VI.

That thereupon the said Bank determined to do indirectly what it was prohibited by the said statutes from doing directly, and formed the scheme to erect the said building through the agency of a corporation formed and owned by it and its officers; that in pursuance of the said scheme the Scandinavian-American Building Company, referred to in said cross-complaint, was formed and incorporated,

at the instigation and request of the said Bank and in its sole interest, by certain of its officers and stockholders, who had no substantial financial interest therein, but who merely organized the said Company and subscribed to the capital stock thereof as agents and dummies of the said Bank, which, after the said organization, took, received and held the capital stock therein as its own.

VII.

That in pursuance of the said scheme the said Bank paid for lot 10, adjoining the said lots 11 and 12, in block 1003, and thereupon caused it to be conveyed to the said Building Company, and thereafter, through the agency of the said Building Company, it began the construction of the building on said lots, referred to in said cross-complaint, and advanced a large sum of money to the said Building Company, which was expended in the construction thereof. [294]

[Inserted at end of paragraph VII as part thereof under order of court made Oct. 19, 1921, in *pursance* of stipulation of counsel.—E. E. C.]

And said Bank took part in the construction of said building and induced, encouraged and persuaded the defendant and others to furnish materials and labor for the construction thereof.

VIII.

That the said Bank used a large part of its funds in carrying out the said scheme and in partially erecting the said building, and thereupon it became impracticable to obtain sufficient money to erect the said building, and pay for the labor and materials

used in the construction thereof, and the entire scheme thereupon collapsed, both the said Bank and the said Building Company became and were found to be insolvent, and a receiver was appointed in this case for the said Building Company, and cross-complainant, John P. Duke, Supervisor of Banking in the State of Washington, took charge of the said Bank, as an insolvent Bank, and is now closing up its business and affairs, in accordance with the laws of the State of Washington.

IX.

Defendant alleges that the said Building Company was merely the agent and creature of the said Bank, and that the erection of the said building was the act of the said Bank, operating through its agency, in the sole interest of the said Bank; that while title to said lots was nominally vested in said Building Company, yet in reality they remained the property of the said Bank, and were so at the time of the purchase of the mortgage referred to in said cross-complaint, by the said John P. Duke, Supervisor of Banking in the State of Washington, as aforesaid.

X.

Defendant further alleges that at the request of the Scandinavian-American Building Company, and while it was the holder of the legal title to said lots, it furnished to said Building Company builders' materials for use in the construction of the said building, hereinbefore referred to, and that within ninety days from the furnishing thereof, it filed a notice in writing in the office of the auditor

of Pierce County, Washington, duly verified as required by law, claiming a lien on the said building and on the said lots, for the amount due on the said builders' materials, and that it thereby acquired a valid lien on the said building and on the said lots, for the price and value of the said builders' materials, to wit, the sum of \$22,165.34; that in its counterclaim in this action, served on cross-complainants, it seeks a foreclosure of the said lien against all the parties to this action.

XI.

Defendant alleges that when the said John P. Duke, Supervisor of Banking in the State of Washington, paid to the Penn Mutual Life Insurance Company, the amount of the said note, the said payment operated as a payment and as a discharge thereof, and that on account of the facts hereinbefore set forth, it would be inequitable and unjust to permit the said John P. Duke, as such Supervisor of Banking in the State of Washington, to hold the said note, which in fact was and represented a debt of the said Bank, and to enforce it against the lien of this defendant, and the said John P. Duke is estopped from so doing. [295]

XII.

That when the said John P. Duke, as Supervisor of Banking in the State of Washington, bought the said note and mortgage and took an assignment thereof, he had full notice and knowledge of all the facts hereinbefore set forth.

XIII.

And defendant further alleges that the said John P. Duke, as Supervisor of Banking in the State

of Washington, had no right, power or authority to purchase the said note and mortgage, referred to in the said cross-complaint, from the Penn Mutual Life Insurance Company, or to take an assignment thereof.

XIV.

Answering the second cross-complaint, set forth in the said answer and cross-complaint, defendant has no knowledge whether the corporation "Drury the Tailor, Inc.," deeded the lot referred to in paragraph I of the said second cross-complaint, to the Scandinavian-American Bank of Tacoma for \$65,000 or any other sum, and it has no knowledge whether the said Scandinavian-American Building Company agreed to deliver to the said Bank, bonds of the value of \$350,000 or any other value or sum, as set forth in said paragraph I; and it has no knowledge whether the said Building Company agreed to deliver to the said Bank the said bonds within a period of four months; and it has no knowledge whatever as to the agreement between the said Building Company and the said Bank, referred to and set forth in said paragraph I of the second cross-complaint; and it has no knowledge as to its terms as therein set forth.

XV.

Defendant has no knowledge whether the agreement referred to in paragraph III of said second cross-complaint was not put on record in reliance upon the agreement of the contractors therein referred to, whether the right to file a lien was waived, and defendant denies that the Scandina-

vian-American Bank of Tacoma is entitled to a lien on the premises therein referred to, as set forth in paragraph IV of said second cross-complaint; and it denies it made any agreement waiving its rights to file a lien as set forth in said paragraph III.

XVI.

Defendant denies that its lien upon the premises referred to in the said second cross-complaint, is inferior, or subject to, or subsequent to the lien of the cross-complainants therein.

XVII.

Defendant admits that the title to lot 10 in block 1003, referring to paragraph II of the said second cross-complaint, was in "Drury, the Tailor, Inc.," and that "Drury, the Tailor, Inc.," deeded the said lot to the Scandinavian-American Building Company, and that the title to lots 11 and 12 in block 1003 was in the Scandinavian-American Bank of Tacoma, and that the said Bank deeded the said lots to the said Building Company, as set forth in said paragraph II of said second cross-complaint; but defendant has no knowledge whether the said lots were deeded to the said Building Company in consideration of the agreement of the said Building Company to deliver the bonds therein referred to, to the said Bank; and it has no knowledge whether it was a [296] part of the agreement between the said Bank and the said Building Company that the said bonds should be delivered to the said Bank and it has no knowledge whether a first mortgage in the sum of \$600,000 was to be

executed by the said Building Company, for all of the said lots, in accordance with the terms of the said agreement; and it has no knowledge whether a mortgage in the sum of \$750,000 was to be executed and delivered as a second mortgage on the said premises; defendant further alleges that it has no knowledge whether the agreement, referred to in said paragraph as Exhibit "AX," was actually made between the said Bank and the said Building Company.

XVIII.

Answering the said second cross-complaint, defendant further alleges that on or about the 5th day of August, 1920, under a contract between it and the said Scandinavian-American Building Company, it began to furnish building tiling, and builders' materials of various kinds, consisting of partition tiling, beam covers, key blocks, skews and other tiling, for use in the construction of a certain bank and office building, which the said Building Company was erecting on lots 10, 11 and 12, in block 1003 in Pierce County, Washington, and in that part of the City of Tacoma, known and described as New Tacoma, as shown on the map and plat of New Tacoma, on file in the office of the auditor of Pierce County, Washington, and that the said builders' material were used in the construction of the said building, which was on the said lots.

XIX.

That this defendant thereafter continued to furnish the said builders' materials, until on January

13th, 1921, it ceased to furnish the same, and that the said builders' materials were furnished and delivered to the said Building Company, at the said building, at its request, and that the price thereof as agreed upon between this defendant and the said Building Company was \$29,048.58, which sum was the fair and reasonable value thereof, and that no part thereof was paid, except the sum of \$6,883.24.

XX.

That the said builders' materials were sold under a contract, providing for the payment thereof thirty days after the delivery thereof, but that although payment thereof was due more than thirty days after the delivery of said builders' materials, no part thereof has been paid, except as above set forth.

XXI.

Defendant further alleges that afterwards, and on the 19th day of January, 1921, it filed a notice of claim of lien in the office of the auditor of Pierce County, Washington, in writing, claiming a lien on the said building, hereinbefore referred to, erected on the lots aforesaid, and on the said lots as the lots on which the said building was being erected, for the amount due for the said builders' materials, a copy of which lien is hereto attached, as Exhibit "A" thereto; that the said notice of claim of lien was duly and regularly acknowledged and was filed in the office of the auditor of Pierce County, Washington, and was duly recorded on

the 24th day of January, 1921, in Lien Record No. 15, page 636. [297]

XXII.

Defendant alleges that by virtue of the furnishing of the builders' materials, hereinbefore referred to, and by the filing of the said notice of claim of lien, hereinbefore set forth, it acquired and has a lien on the said building, hereinbefore referred to, erected on said lots 10, 11, 12 in Block 1003, and on the said lots, for the amount due for the said builders' materials, and interest thereon, and defendant further alleges, that in this action it has filed a cross-complaint against the complainant therein, and all of the defendants therein, setting up its lien, and asking for a foreclosure thereof, in accordance with the practice of this Court in such cases, and alleging that its lien is prior to the lien or claim of the cross-complainants, John P. Duke and the Scandinavian-American Bank of Tacoma, as set forth in their second cross-complaint.

XXIII.

Defendant further alleges in this connection, that at the time it furnished the builders' materials, hereinbefore referred to, it had no notice or knowledge whatever of the agreement, set forth in the second cross-complaint aforesaid, and that it had no notice or knowledge that the Scandinavian-American Building Company had agreed to pay the Scandinavian-American Bank of Tacoma any sum whatever for the lots hereinbefore referred to, and it alleges that it had no notice or knowledge that the said Building Company had agreed to pay

the said Bank for the said lots, by the delivery to it of bonds, or any other property or money, or that it had agreed to give a mortgage on the said lots for the sum of \$600,000, or any other sum, as set forth in the said second cross-complaint, and it alleges that its said lien is therefore prior to the rights of the said Bank and of the said John P. Duke, as Supervisor of Banking liquidating said Bank, under and by virtue of said contract and arising from said sale.

XXIV.

Answering the third cross-complaint set forth in the said answer and cross-complaint, defendant alleges that it has no knowledge whether the Scandinavian-American Building Company obtained from the Metropolitan Life Insurance Company an agreement to lend \$600,000.00 on the building as set forth in paragraph II thereof, and it alleges that it has no knowledge whether G. Wallace Simpson represented that he could or would pledge the mortgage therein referred to to obtain money, and it has no knowledge whether the sums thereby obtained were to be repaid to the lenders thereof out of the money obtained from the Metropolitan Life Insurance Company as set forth in the said second paragraph.

XXV.

Defendant denies that the Scandinavian-American Building Company executed and delivered to G. Wallace Simpson the promissory note referred to in paragraph III of said third cross-complaint in accordance with the agreement therein referred

to, and it also denies that it executed the said promissory note in the due exercise of the powers and authorities in that behalf by it possessed, and it denies that due corporate action was first had for the purpose of making, executing or delivering the said note as set forth in paragraph III of said third cross-complaint. [298]

XXVI.

Defendant denies that the Scandinavian-American Bank of Tacoma made, executed or delivered to the said G. Wallace Simpson the mortgage referred to in paragraph IV of said third cross-complaint in the due exercise of the powers and authorities by it in that behalf possessed, and it denies that it was executed after corporate action had first been had in respect thereto.

XXVII.

Defendant alleges that it has no knowledge whether the Scandinavian-American Bank of Tacoma began the erection of the sixteen story building referred to in paragraph VII of said third cross-complaint, pursuant to the contracts therein referred to, but it denies affirmatively as alleged in paragraph VII that all of the contracts therein referred to provided that the laborers and materialmen should have no lien against the real property described in the contracts referred to as Exhibit "X." On the contrary, this defendant alleges that it made no contract whatever with the Scandinavian-American Building Company or anyone else by which it waived its lien for the builders' materials hereinafter referred to, or agreed that it should

have no lien against the real property referred to in said paragraph.

XXVIII.

Defendant denies that the sum of \$40,000.00 is a reasonable attorneys' fee in the matter of foreclosing the mortgage set forth in said third cross-complaint. On the contrary it alleges that a reasonable sum for so doing is the sum of \$2500.00, and no more.

XXIX.

Defendant denies that its interest, claim and lien on the premises referred to in said third cross-complaint, which is hereinafter more specifically set forth, is inferior or subsequent to the alleged lien of the cross-complainants set forth in the said cross-complaint.

XXX.

Defendant has no knowledge whether the Scandinavian-American Bank of Tacoma advanced to the Scandinavian-American Building Company the sum of \$432,822.99, or any other sum, between the 25th day of June, 1920, and the 15th day of January, 1921, or at any other time, as set forth in paragraph VIII of said third cross-complaint, but it denies affirmatively that in making the alleged advances, referred to in said paragraph, the said bank fulfilled the agreement of the said G. Wallace Simpson therein referred to, to the extent of the said \$432,822.99 or any other sums.

XXXI.

Further answering said third cross-complaint, defendant alleges that the note and mortgage for

\$600,000.00 referred to therein, were executed and delivered by the president and secretary of the said Scandinavian-American Building Company without any power or authority so to do from the trustees or stockholders of said company and that the execution of the said note and mortgage was not made or performed in pursuance of any power or authority conferred on the said officers by the vote of a majority or [299] a quorum of the trustees of the said company at any meeting of the said trustees lawfully assembled or otherwise, and the same was therefore invalid and void as was well known to the said Scandinavian-American Bank of Tacoma at the time it took the alleged assignment of the said note and mortgage from the said G. Wallace Simpson.

XXXII.

Defendant further alleges that the alleged note for \$600,000.00 and mortgage securing the same, referred to in said third cross-complaint, were delivered to the said G. Wallace Simpson as agent for the Scandinavian-American Building Company, for the express purpose of enabling him to sell and dispose of the same and to secure the money therefor and that he had no power or authority to dispose of, sell, assign, transfer or pledge the said note or mortgage, except to sell the same to obtain the money therefor. That the said Scandinavian-American Bank of Tacoma well knew the said purpose for which the said note for \$600,000.00 and the mortgage securing the same, were executed and delivered to the said G. Wallace Simpson, and

it well knew that he had no power or authority to sell, assign or transfer the same except for money received, and this defendant alleges that when the Scandinavian-American Bank of Tacoma took this assignment of said note and mortgage from the said G. Wallace Simpson, no money or consideration was paid to the said G. Wallace Simpson or anyone else therefor.

XXXIII.

Defendant further alleges that the said promissory note to the said G. Wallace Simpson, and the mortgage securing the same, were executed and delivered to him without any consideration therefor and that during the time the said note and mortgage were held by the said G. Wallace Simpson, neither their money nor labor, or anything else of value, were paid to or received by the Scandinavian-American Building Company therefor, and it was beyond the power of the said Scandinavian-American Building Company, its trustees, officers or agents, to execute, deliver or assign the said note and mortgage, without any consideration, and the same together with the assignment thereof are void.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD. 3
(IN THREE VOLUMES.)

FORBES P. HASKELL, as Receiver of SCANDINAVIAN-AMERICAN
BUILDING COMPANY, a Corporation, et al.,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees.

TACOMA MILLWORK SUPPLY COMPANY, a Partnership Consisting of
ANN DAVIS and R. T. DAVIS, Jr., as Executors of the Estate of
R. T. DAVIS, Deceased, R. T. DAVIS, Jr., LLOYD DAVIS, HARRY
L. DAVIS, GEORGE L. DAVIS, MAUDE A. DAVIS, MARIE A.
DAVIS, RUTH G. DAVIS, HATTIE DAVIS TENNANT and ANN
DAVIS,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees.

McCLINTIC-MARSHALL COMPANY, a Corporation, and E. E. DAVIS &
COMPANY, a Corporation, and FAR WEST CLAY COMPANY, a
Corporation,

Appellants,

vs.

ANN DAVIS and R. T. DAVIS, Jr., as Executors of the Estate of R. T.
DAVIS, Deceased, et al.,

Appellees.

WASHINGTON BRICK, LIME & SEWER PIPE COMPANY, a Corporation,
Appellant,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees.

BEN OLSON COMPANY, a Corporation,

Appellant,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees.

J. P. DUKE, as Supervisor of Banks of the State of Washington, and as
Successor in Office of the Defendant CLAUDE P. HAY, as State
Bank Commissioner of the State of Washington, FORBES P. HAS-
KELL, Jr., as Special Deputy Supervisor of Banks of the State of
Washington, and SCANDINAVIAN-AMERICAN BANK OF TACOMA,
a Corporation,

Appellants,

vs.

McCLINTIC-MARSHALL COMPANY, a Corporation, et al.,

Appellees.

VOLUME II.

(Pages 417 to 864, Inclusive.)

Upon Appeals from the United States District Court for the Western
District of Washington, Southern Division.

FILED

JAN 30 1923

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VOLUME II.
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XXXIV.

Defendant further alleges that during the year 1920 the Scandinavian-American Bank of Tacoma formed the plan of erecting a building on lots 11 and 12 in block 1003, referring to the first cross-complaint, and also on lot 10 adjoining the same; but the building planned by it was so costly and expensive that the said Bank could not erect the same without investing in it a sum in excess of thirty per cent of its capital, surplus and undivided profits, which would be in violation of the statutes of the State of Washington, unless the consent of the Bank Examiner thereto was obtained; that the consent of the Bank Examiner thereto could not be obtained; that thereupon the said Bank determined to do indirectly what it was prohibited by the said statutes from doing directly, and formed the scheme to erect the said building through the agency of a corporation formed and owned by it and its officers; that in pursuance of the said scheme the Scandinavian-American Building Company, referred to in said cross-complaint, was formed and incorporated at the instigation and request of the said Bank and in its sole interest, by certain of its officers and stockholders who had no substantial financial interest therein but who merely organized the said company and subscribed to the capital stock thereof as [300] agents and dummies of the said Bank, which, after the said organization, took, received and held the capital stock therein as its own; that in pursuance of the said scheme the said Bank paid for Lot 10, adjoining the said Lots

11 and 12, and thereupon caused it to be conveyed to the said Building Company, and thereafter through the agency of the said Building Company it began the construction of the building on said lots referred to in said cross-complaint and advanced to said building company a large sum of money which was expended in the construction of said building. That the said Bank used a large part of its funds in carrying out the said scheme and in partially erecting the said building, and thereupon it became impracticable to obtain sufficient money to erect the said building and pay for the labor and materials used in the construction thereof, and the entire scheme thereupon collapsed, both the said Bank and the said Building Company became and were found to be insolvent and a receiver was appointed in this case for the said Building Company, and cross-complainant John P. Duke, Supervisor of Banking of the State of Washington, took charge of the said bank as an insolvent bank and is now closing up its business and affairs in accordance with the laws of the State of Washington.

XXXV.

Defendant alleges that the said Building Company was merely the agent and creature of the said Bank and that the erection of the said building was the act of the said Bank operating through its agency in the sole interest of the said Bank; that while title to said lots was nominally vested in said Building Company yet in reality they remained the property of the said Bank and were so at the time of the assignment of the mortgage referred

to in said cross-complaint to the said Scandinavian-American Bank of Tacoma.

XXXVI.

Defendant further alleges that at the request of the Scandinavian-American Building Company, and while it was the holder of the legal title to said lots, it furnished to said Building Company builders' materials for use in the construction of the said building hereinbefore referred to, and that within ninety days from the furnishing thereof it filed a notice in writing in the office of the auditor of Pierce County, Washington, duly verified as required by law, claiming a lien on the said building and on the said lots for the amount due on the said builders' materials, and that it thereby acquired a valid lien on the said building and on the said lots for the price and value of the said builders' materials, to wit: The sum of \$22,165.34; that in its counterclaim in this action served on cross-complainants, it seeks a foreclosure of the said lien against all the parties to this action.

XXXVII.

Defendant further alleges that at the time it commenced to furnish the builders' materials hereinbefore referred to, the mortgage set forth in the third cross-complaint had not attached and no money or other consideration had been paid, advanced or contracted for thereunder and that at the time of the alleged transfer and assignment of the said note and mortgage to the Scandinavian-American Bank of Tacoma by the said G. Wallace Simpson, this defendant had already commenced to

furnish builders' materials hereinbefore referred to, as was then well known to the said Scandinavian-American Bank of Tacoma, and its right to a lien therefor had already attached under the laws of the State of Washington. [301]

WHEREFORE defendant prays that the said cross-complaints, and each of them, be dismissed, and that the lien of this defendant be adjudged and decreed to be prior to all claims and demands of the cross-complainants and each of them in and to, on or against the said real estate hereinbefore referred to, and may defendant have a decree foreclosing its said lien as prayed for in its counterclaim heretofore filed in this action; and may this defendant have a judgment against the said cross-complainant for its costs and disbursements in its behalf incurred.

R. S. HOLT,

Attorney for Far West Clay Company.

1115 Fidelity Bldg.,

Tacoma, Washington.

(Exhibits and verification not attached to this copy.)

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 5, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [302]

Stipulation Adopting Answer of Far West Clay Company as Answer of Certain Other Parties.

WHEREAS it is deemed essential and advantageous by all parties in the above-entitled case to avoid repetition in pleadings and to get the case at issue with the least possible delay and

WHEREAS the defenses of many of the lien claimants to the cross-complaint of the Scandinavian-American Bank and John P. Duke will be the same; and

WHEREAS certain of the other lien claimants wish to adopt and make use of the answer of the Far West Clay Company, now on file;

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the undersigned attorneys for the said Scandinavian-American Bank and John P. Duke, and the undersigned attorneys, who represent other defendants in this case, that the answer of the Far West Clay Company, to the cross-complaints of the Scandinavian-American Building Company and John P. Duke, be and the same is hereby adopted by and shall be taken to be and considered as the answer of each and every one of the defendants signing this stipulation.

IT IS FURTHER STIPULATED that this stipulation shall be taken and considered as the separate answer of each one of the said defendants as though said answer was set forth in full by each defendant and filed as a separate pleading; and it is further stipulated that this stipulation shall be

deemed and considered as having set out in proper and sufficient form the same defenses to the said cross-complaints of the Scandinavian-American Bank and John P. Duke, as are set forth in the said answer of the Far West Clay Company; and that the said stipulation shall be taken as having set forth in the respective answer of each defendant signing, his or its claim of lien as set forth in his or its respective cross-complaint now on file in this cause.

Tacoma, July 18/'21.

STILES & LATCHAM and
J. F. FITCH,

Attys. for Ben Olson Co.

STILES & LATCHAM,

Attys. for F. H. Godfrey.

D. R. HOPPE,

Attorney for Theodore Hedlund.

HARTMAN & HARTMAN,

Attorneys for W. E. Morris.

BURKEY, O'BRIEN & BURKEY,

Attorneys for City Lumber Agency.

R. S. HOLT,

Attorney for Far West Clay Co.

WALTER S. FULTON,

Attorney for Crane Company.

BATES & PETERSON,

Attorneys for Puget Sound Iron & Steel Works.

Attorneys for McClintic-Marshall Co.

Attorneys for Scandinavian-American Bank, F. P.

Haskell, J. P. Duke, Scandinavian-American
Building Co., Claud P. Hay.

Attorneys for Tacoma Millwork Supply Co.

Attorneys for E. E. Davis & Co.

Attorneys for U. S. Machine & Engineering Com-
pany, Inc.

Attorneys for Carl J. Gerring and George
Gerring.

DE WITT M. EVANS,

Attorney for F. R. Schoen.

S. F. McANALLY,

Attorney for C. H. Boedecker and Wm. L. Owen.

CHARLES BEDFORD,

Attorney for N. A. Hansen, A. J. Van Buskirk,
C. W. Crouse, F. L. Swain, D. A. Trolson, Fred
Gustafsen, E. Scheibel, Paul Scheibel, F. J.
Kazda, W. Donellan, P. Hagstrom, Arthur
Purvis, Roy Farnsworth, C. B. Dustin, L. J.
Pettifer, Charles Bond, L. H. Broten, W. Can-
aday, L. R. Lilly, F. McNair, Dave Shields,
Ed Lindberg, Joe Tikalsky, P. Mente, C. Gus-
tafson, George Larson, F. Marcellino, M. Swan-
son, William Griswold, O. E. Olson, C. I. Hill,
Emil Johnson, C. Peterson, Earl Whitford, F.
A. Petterly and Thomas S. Short and George
W. Hicks.

BOGLE, MERRITT & BOGLE,

Attorneys for Otis Elevator Company.

W. W. KEYES,

Attorney for Hunt Mottet Co. and Henry Mohr
Hardware Co.

FITCH & ARNTSON,

Attorneys for Savage-Scofield Co.

H. A. P. MYERS,

Attorney for H. C. Greene as H. C. Greene Iron
Works.

TEATS, TEATS & TEATS,

Attorneys for J. D. Mullins.

L. R. BONNEVILLE,

DAVIS & NEAL,

Attorneys for Robert M. Davis and Frank C.
Neal. [303]

H. S. GRIGGS and

L. R. BONNEVILLE,

Attorneys for St. Paul & Tacoma Lumber Co.

WALTER M. HARVEY,

Attorney for Edward Miller Cornice & Roofing Co.,
Without Prejudice to the Right to Urge and
Rely on the Allegations *Allegations* and *f* Aver-
ments of Our Answer and Cross-complaint on
File Herein.

CHAS. P. LUND,

DAVIS & NEAL,

Attorneys for Washington Brick, Lime & Sewer
Co.

B. S. GROSSCUP and

W. C. MORROW,

CHAS. A. WALLACE,

Attorneys for Colby Star Mfg. Co. and P. & G.
Lumber Co.

LYLE, HENDERSON & CARNAHAN,
Attorneys for Tacoma Shipbuilding Co.

J. M. LOCKERBY,

Attorney for J. A. Soderberg.

LUND & LUND,

Attorney for Gustaf Johnson.

BAUSMAN, OLDHAM, BULLITT &
EGGERMAN,

Attorneys for Sherman Wells, Frederick Webber.

LOUIS J. MUSCEK,

Attorney for M. Kleiner, Doing Business as Liberty
Lumber & Fuel Co.

The Scandinavian-American Bank of Tacoma,
F. P. Haskell, J. P. Duke and Scandinavian Build-
ing Co. and Claud P. Hay, each hereby waive the
right to raise any objection to the above procedure
and agree to said stipulation with the qualification
that the defenses set forth in said answer of the
Far West Clay Co. and referred to in the said
stipulation are not admitted or agreed to be suffi-
cient in law or equity.

GUY E. KELLY,

THOS. MacMAHON,

F. D. OAKLEY,

Attorneys for Above-named Defendants. [304]

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Southern
Division. Oct. 13, 1921. F. M. Harshberger, Clerk.
By Ed M. Lakin, Deputy. [305]

**Order Approving and Ratifying Stipulation Re
Answer of Far West Clay Company.**

It appearing that certain written stipulations have been entered into by the parties herein, relating to the pleadings and issues in this cause, by the terms of one of which stipulations it was provided among other things that the stipulation shall be treated as a denial by each of the parties thereto of each and every one of the material allegations alleged by each of the other parties in his answer and cross-complaint or counterclaim, and that the stipulation shall be treated as a pleading by each of the parties thereto and other matters set forth fully in said stipulation; and the other of said stipulations providing that the answer of the Far West Clay Company to the cross-complaints of the Scandinavian-American Building Company and John P. Duke, be taken to be and considered as the answer of each and every one of the defendants signing the stipulation, and providing further that the stipulation shall be taken and considered as the separate answer of each one of the said defendants, as though said answer were set forth in full by each defendant and filed as a separate pleading, and other matters set forth fully in said stipulation; [306]

NOW, THEREFORE, IT IS HEREBY ORDERED, that said stipulations are in all things approved and ratified and shall be deemed to be a part of the pleadings upon which this case is to be tried.

IT IS FURTHER ORDERED that this order shall be entered as of the 19th day of October, 1921.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [307]

Stipulation Avoiding Cross-Complaints as Between Defendants.

WHEREAS, each of the parties whose names are hereunto signed have filed answers and cross-complaints, or answers and counterclaims in the above-entitled action, in which each of them has set up and asserted a lien for labor or builders' materials, or for labor and materials as a contractor or subcontractor, furnished for or used, or manufactured for or used in the steel office building which has been partly constructed by the Scandinavian-American Building Company as the reputed owner thereof, on lots 10, 11 and 12 in block 1003 in that part of the City of Tacoma known as "New Tacoma," said property being more particularly described in the amended and supplemental complaint and other pleadings in this action; and

WHEREAS, each of the parties hereto disputes in whole or in part the right of each of the other parties to a lien on the said building and the said premises, and each one disputes the priority of the

lien of the other, over his, and some of them claim a priority over the liens of the others if the same are established; and

WHEREAS, it is considered desirable, in order to prevent the accumulation and the filing of so many pleadings by the respective parties, that the process of raising an issue as to the lien, the validity thereof, and the priority of the lien, of each of said parties by each of the others, may be accomplished in some short method without each of the parties being compelled to file a separate pleading to the answer and counterclaim of each of the others; and

WHEREAS, it is thought that this purpose may be subserved by a stipulation for that purpose between all the parties hereto, now, therefore, in order to accomplish the said purpose,

IT IS HEREBY STIPULATED AND AGREED

I.

That this stipulation shall be treated as a denial by each of the parties hereto of each and every one of the material allegations set forth and alleged by each of the other parties hereto in his answer and cross-complaint or counterclaim, setting up his said lien or claim. [308]

II.

That this stipulation shall be treated as a pleading by each of the parties hereto in answer or reply to the answer and cross-complaint or answer and counterclaim of each of the other parties hereto, denying the right of each and every one of the said other parties to a lien, and denying the priority of the lien of each and every one of them, and asserting

the priority of the lien of such party hereto over each, any, or all of the liens of the other parties hereto.

III.

That this stipulation shall be treated as a pleading in behalf of each of the parties hereto, to the answer and cross-complaint or the answer and counterclaim of each of the other parties, raising each and every defense against the lien of each of the said other parties, as the validity or the priority thereof, and which the said parties may desire to assert or raise against the same; and to make this part of the stipulation more definite, IT IS EXPRESSLY UNDERSTOOD, that under this stipulation, treated as a pleading as aforesaid, each of the parties may introduce against each or all of the other parties hereto, any relevant or material evidence in support of an affirmative defense which shows that for any reason any one or more of the other parties hereto has no lien or has waived his lien or that his lien is subject or subordinate to the lien of the party asserting the said defense, or any other defense of an affirmative nature or character tending to defeat the lien of the other party or parties, and to establish the lien of the party asserting the defense, or its priority over any of the other liens so questioned or attacked.

It is, however, understood, with respect to any affirmative defenses embraced within this stipulation, that when the evidence is taken in support of any one of the liens to which any objection is made or with respect to which there is in any respect a contest, any of the parties hereto who may desire

to interpose some special affirmative defense which is not raised or suggested by the written pleadings in the case, he shall in a general way at some time during the progress of the taking of the evidence, inform the party who is seeking to establish his lien, of the nature and character of the defense or defenses, or objections, to the said lien or claim and as to any priority which he may intend to make or support by evidence. Any such defense or objection so stated shall inure to the benefit of all the parties hereto without a separate statement or objection by each one.

IV.

It is not intended hereby that the question of order or *quantum* of proof necessary to be made in support of any of the liens, shall be affected or controlled by this stipulation, but each party shall proceed to prove his lien in the usual and customary manner.

SCANDINAVIAN-AMERICAN
BUILDING CO.,
CLAUD P. HAY.
FLICK & PAUL,

Attorneys for Tacoma Millwork Supply Co.
STILES & LATCHAM,
Attorneys for F. H. Godfrey.
STILES & LATCHAM and
J. F. FITCH,

Attorneys for Ben Olson.

B. S. GROSSCUP and
W. C. MORROW,
CHAS. A. WALLACE,

Attorneys for Colby Star Mfg. and P. & G. Lumber
Co.

LYLE, HENDERSON & CARNAHAN,
Attorneys for Tacoma Shipbuilding Co.

J. M. SOCKERBY,

Attorney for J. A. Soderberg.

LUND & LUND,

Attorneys for Gustaf Johnson.

BAUSMAN, OLDHAM, BULLITT &
EGGERMAN,

Attorneys for Sherman Wells, Frederick Webber.

Attorney for Carl J. Gerring and George Gerring.

DE WITT M. EVANS,

Attorney for F. R. Schoen.

S. F. McANALLY,

Attorney for C. H. Bodecker and William L.
Owens.

CHARLES BEDFORD,

Attorney for N. A. Hansen, A. J. Van Buskirk,
C. W. Crouse, F. L. Swain, D. A. Trolson, Fred
Gustafsen, E. Scheibel, Paul Scheibel, F. J.
Kazda, W. Donnellan, P. Hagstrom, Arthur
Purvis, Roy Farnsworth, C. B. Dustin, L. J.
Pettifer, Charles Bond, L. H. Broten, W. Can-
aday, L. R. Lilly, F. McNair, Dave Shields,
Ed Lindberg, Joe Tikalsky, P. Mente, C. Gus-
tafson, George Larson, F. Marcellino, M. Swan-
son, William Griswold, O. E. Olson, C. I. Hill,

Emil Johnson, C. Peterson, Earl Whitford,
F. A. Petterly and Thomas S. Short and George
W. Hicks.

LOUIS J. MUSCEK,

Attorney for M. Kleiner, Doing Business as Liberty
Lumber Fuel Co.

BOGLE, MERRITT & BOGLE,

Attorneys for Otis Elevator Company.

W. W. KEYES,

Attorney for Hunt Mottet Company and Henry
Mohr Hardware Company.

Attorneys for McClintic-Marshall Co.

Attorneys for Scandinavian-American Bank, F. P.
Haskell, J. P. Duke. [309]

FITCH & ARNTSON,

Attorneys for Savage-Scofield Co.

H. A. P. MYERS,

Attorney for H. C. Greene as H. C. Greene Iron
Works.

D. R. HOPPE,

Attorney for Theodore Hedlund.

HARTMAN & HARTMAN,

Attorneys for W. E. Morris.

JAMES W. REYNOLDS,

PETERS & POWELL,

Attorneys for E. E. Davis.

BURKEY, O'BRIEN & BURKEY,

Attorneys for City Lumber Agency.

E. N. EISENHOWER,

Attorney for Carl Gebbers, Fred S. Haines, Ajax
Electric Co.

TEATS, TEATS & TEATS,

Attorneys for J. D. Mullins.

R. S. HOLT,

Attorney for Far West Clay Co.

L. R. BONNEVILLE,

DAVIS & NEAL,

Attorneys for Robert M. Davis and Frank C.
Neal.

WALTER S. FULTON,

Attorney for Crane Company.

BATES & PETERSON,

Attorneys for Puget Sound Iron & Steel Works.

H. S. GRIGGS and

L. R. BONNEVILLE,

Attorneys for St. Paul & Tacoma Lumber Co.

WALTER M. HARVEY,

Attorney for Edward Miller Cornice & Roofing
Co.

CHAS. P. LUND,

DAVIS & NEAL,

Attorneys for Washington Brick, Lime & Sewer
Co.

A. O. BURMEISTER,

Attorney for U. S. Machine & Engineering Com-
pany, Inc. [310]

The Scandinavian-American Bank of Tacoma, F.
P. Haskell, Jr., J. P. Duke, and Scandinavian
Building Co. and Claud P. Hay, each hereby waive

the right to raise any objection to the above procedure.

GUY E. KELLY,
THOS. MacMAHON,
F. D. OAKLEY,

Attorneys for Above-named Defendants.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 13, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [311]

Stipulation Between Attorneys for McClintic-Marshall Co., E. E. Davis & Co., Far West Clay Co., and Tacoma Millwork Supply Co. for Use on Appeal of Briefs Filed in This Case.

The undersigned attorneys respectively for McClintic-Marshall Company, E. E. Davis & Co., Far West Clay Company and R. T. Davis et al., doing business under the firm name and style of Tacoma Millwork Supply Company, do hereby stipulate that the memorandum briefs of the attorneys for the complainant and the cross-complainant Tacoma Millwork Supply Company, submitted to his Honor Judge Edward E. Cushman, and each and every part thereof, may be used by way of excerpts therefrom in the briefs on appeal, and that this stipulation may be and shall be incorporated in the praecipe to evidence this agreement.

Further, that neither the briefs nor the excerpts therefrom need be forwarded to the Circuit Court

of Appeals in any part of the record, nor need the same, or any part thereof, be printed in the record, but that that portion of the respective briefs on appeal shall be interchanged in typewritten form between the attorneys for litigants herein mentioned prior to printing the same so that the excerpts may be carefully checked with the original briefs used in argument before his Honor Judge Cushman.

Dated this 8th day of November, 1922.

HAYDEN, LANGHORNE & METZGER,

Attorneys for McClintic-Marshall Co. [312]

PETERS & POWELL,

Attorneys for E. E. Davis & Co.

EDWIN H. FLICK,

Attorneys for Tacoma Millwork Supply Co.

ALFRED J. SCHWEFFE,

Of Counsel.

R. S. HOLT,

Attorney for Far West Clay Co.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 9, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [313]

Memorandum Decision.

Filed March 31, 1922.

HAYDEN, LANGHORNE & METZGER, for Com-
plainant,

KELLY & McMAHON, F. D. OAKLEY, Esq., for
Defendant Bank and Building Company.

CHAS. BEDFORD, Esq., DAVIS & DEAL, L. R.
BONNEVILLE, Esq., for Labor Claimants.

DeWITT EVANS, Esq., for F. R. Shoen.

BATES & PETERSON, for Puget Sound Iron &
Steel Works,

STILES & LATCHAM, for F. H. Godfrey and Ben
Olson Company.

F. S. McANALLY, Esq., for W. L. Owens and
C. H. Boedecker.

BURKEY, O'BRIEN & BURKEY, for City Lum-
ber Agency.

HERBERT S. GRIGGS, Esq., L. R. BONNE-
VILLE, Esq., for St. Paul & Tacoma Lbr. Co.

W. W. KEYES, Esq., for Hunt & Mottet and Henry
Mohr Hdwe. Company.

FITCH & ARNTSON, for Savage-Scofield Co.
[314]

R. S. HOLT, Esq., for Far West Clay Co.

GROSSCUP & MORROW, CHAS. WALLACE,
Esq., for P. & G. Lumber Co., Colby Star Mfg.
Co.

WALTER S. FULTON, Esq., for Crane & Co.

CHARLES P. LUND, Esq., DAVIS & NEAL, for
Washington Brick, Lime & Sewer Pipe Co.

E. N. EISENHOWER, Esq., for Ajax Electric Co.
TEATS, TEATS & TEATS, for Mullins Bros.

H. A. P. MEYERS, for H. C. Green Iron Works.

JAMES W. REYNOLDS, for E. E. Davis Co.

BOGLE, MERRITT & BOGLE, for Otis Elevator Co.

WALTER M. HARVEY, Esq., for Edward Miller
Cornice & Roofing Co.

FLICK & PAUL, for Tacoma Millwork Supply
Company.

CUSHMAN, D. J.—The present suit involves a number of asserted liens for labor and material furnished in and for the construction of a building upon that property commonly known as the “Scandinavian-American Building Company property,” and the marshalling of such liens as are established.

Upon many of the issues raised, there appear a number of reasons supporting the Court’s findings, which have been urged by counsel, but, on account of the desirability of an early decision upon the questions involved, the Court has, in most instances, done no more than state some one reason which appears sufficient to justify and require that finding.

Further delay is not only prejudicial to the parties to this suit and creditors of the bank, but the Court’s recollection of the testimony cannot but wane with the passing of time and the public, as well as the parties, is interested in a speedy determination.

Many points have been argued and considered in this case that are pertinent and the discussion of

which here would [315] be appropriate, and, no doubt, more satisfactory to counsel who have so earnestly urged them, but the discussion of which would, necessarily, postpone the determination of this cause. It is, therefore, deemed sufficient to state that the points made would in many instances support the conclusions reached, and in no way defeat or adversely control any of them.

There are a number of general questions affecting more than one of the liens, which can be considered in the abstract. Among these is the question of a right to lien for material, materials fabricated, and materials and fixtures specially prepared for the building, but not delivered on the premises to be improved. These questions affect the claims of the Tacoma Millwork Supply Company, Washington Brick, Lime & Sewer Pipe Company, Ben Olson Company, Crane & Company, and Edward Miller Cornice & Roofing Company.

The Washington statute involved provides:

“Every person performing labor upon or furnishing material to be used in the construction * * * of any * * * building * * * has a lien upon the same for the labor performed or material furnished by each, * * * .” (Sec. 1129 Rem. & Bal. Code.)

While this statute has been before the Supreme Court of the State of Washington in many cases, the later expressions of that Court to the point in question appear in *Western Hdwe. & Metal Co. vs. Maryland Casualty Co.* (105 Wash., 54) and *Holly-*

Mason Hdwe. Co. vs. National Surety Company, et al. (107 Wash., 74).

While it may be true that, in a controversy solely between the materialman, or contractor or subcontractor, and the owner, the owner will be estopped to deny the lien because of a failure to deliver the material, where any act of his, or act with which he may be charged, has in any way caused such failure, yet, when the substantial controversy is, as it is here, between the lien claimants, no such rule should be applied. While the contractor or subcontractor may, where material has been delivered to him for work upon it by him, be considered, in some respects, [316] as the agent of the owner (Western Hdwe. & Metal Co. v. Maryland Cas. Co., 105 Wash. 54), the owner is not the lien claimant's agent; nor will the lien claimant, himself, be considered the agent of the owner in respect to his own lien claims, where he claims to have retained the material in his shop or factory for the purpose of completing necessary work upon it, or because the owner was not prepared to receive it at the building being constructed.

The Court holds that there is no lien right on the part of any claimant here for any material or fixture not delivered on the premises where the building was in course of construction, nor for any labor performed upon any such material or fixture.

While a contractor, or subcontractor may have been held to be the agent of the owner when a materialman delivered material to the contractor or subcontractor for work to be done upon it away

from the premises—the owner and his bondsman being thereby estopped to deny the lien because of a want of delivery (*Western Hdwe. & Metal Co. vs. Maryland Cas. Co., supra*)—yet there is no reason that will extend that rule to make one lien claimant, contractor or subcontractor the agent of another who has done nothing to clothe him with power or authority as against another lien claimant.

Cases where fixtures or other material not delivered have been specially prepared and their value, apart from the structure for which they have been prepared, is little or nothing, make a strong appeal for consideration in equity, yet to allow the lien on that account would lead to unending uncertainty, doubt and confusion and to prejudice of others contemplating furnishing material or who have furnished labor and material.

Material delivered upon the premises constitutes notice, not only to the owner, but to other materialmen, laborers and contractors of potential charges against the property, but materials not delivered, in the absence of actual knowledge, cannot do so.

The case of *Western Hdwe. & Metal Co. vs. Maryland* [317] *Casualty Co.* (105 Wash. 54) was a bond case; that is, a suit upon a statutory bond to secure those performing work or furnishing materials in the installation of a heating plant in a school, which bond is, by statute, required in such cases in lieu of the security which, by the lien statute, is afforded laborers and materialmen in the improvement of private property.

It has been argued that there is no distinction between such a case and the present; but there is this distinction: A surety on the bond stands behind, or in the shoes of, the principal. He has no lien upon the property. While, as between the lien claimants, there are primary equities to be considered which only remotely affect a surety, if at all. A particular lien claimant has a right, not only to look to the property improved, but to the value of the improvement as it progresses and to the materials assembled upon, and delivered at the property for its improvement.

Claims of lien for material not actually delivered at the bank building are denied. The following Washington cases—the construction of which court, of the statute involved, this court is bound to follow—require such holding:

Knudson-Jacob Co. v. Brandt, 44 Wash. 68;

Crane Co. v. Farnandis, 46 Wash. 436;

Tsutakawa v. Kumamoto, 53 Wash. 231;

Gate City Lbr. Co. v. Montesano, 60 Wash. 586;

Western Hdwe. & Metal Co. v. Maryland Cas. Co., 105 Wash. 54;

Holly-Mason Hdwe. Co. v. National Surety Co., et al., 107 Wash. 74.

Neither lien nor judgment will be decreed for any material delivered and reclaimed by the lienor under order of the court, or otherwise.

In the contracts of a number of the lien claimants, there is a provision reciting a waiver of any lien on account of the work and material to be furnished under the contract. These waivers were exe-

cuted upon the strength of statements made by representatives of the defendant in negotiating the contracts that [318] waiver had been made by all others who had contracts and would be required of those with whom contracts had not yet been made. It was further represented that funds had been provided or secured to pay for the construction of the building. These statements were erroneous.

Taking into account the presumption that one would not lightly waive the security afforded by a lien, it is clear that these waivers are avoided, and it is not necessary to determine whether there was actual fraud in the representations made or not for, if there was not actual fraud, the injurious effect upon the claimants was the same. The representations constitute constructive fraud. If belief in the facts by the negotiating parties were considered only as a mutual mistake, the avoiding of the waiver would be the same for the claimants entered upon the performance of their contracts before discovery of the mistake.

Mr. Haskell, as receiver of the Bank—not as receiver of the Building Company, acquired a note and mortgage of the Building Company for \$70,000. This mortgage was outstanding at the time the various contracts relating to the construction of the building were made. The receiver's purpose was to protect the property from foreclosure of the underlying mortgage and, in form, it was a purchase by him. The deed from the bank to the Building Company of this property was a warranty deed. Under these circumstances, the ordi-

nary rule that it would be inequitable for the court to sanction a receiver's act for the benefit of one set of creditors, and at the same time, to the injury of other creditors, lends no support to those now contending for, and invoking this rule, for the Bank's creditors are not the Building Company's creditors; nor are the latter bank creditors, and, while Mr. Haskell is receiver of both the Bank and the Building Company, the money used in taking up the mortgage was the Bank's and he was acting as the Bank's receiver, out of the control of this court, in so doing. If, because of the relation between the Bank and Building Company, it is sought to apply such a rule upon all [319] equitable considerations, it can be invoked rather by the lien claimants than by the Bank's receiver.

The deed from the Bank to the Building Company being a warranty deed, if the lien claimants were not in privity with the owner so that they could maintain suit against the Bank upon the warranty, the Building Company and its receiver could maintain such a suit and anything realized therefrom could be subjected to judgments recovered by the lien claimants.

The Bank's receiver, in taking up this mortgage was merely seeking to prevent the further increase of claims against the trust estate in his hands, which, if suffered, would result in the dilution of the assets and could not but prejudice the depositors and other creditors of the Bank. Under these circumstances, to hold the Bank receiver's action in taking up the underlying mortgage a purchase, whereby he escaped

liability upon the warranty and also secured a position of advantage where he could defeat the lien claimants, not only has no equity in it, but would be highly inequitable.

Were it not for the fact that control of the Building Company was had by the Bank at all times, it might be that the failure of the Building Company to deliver to the Bank the second mortgage bonds, would free the Bank from obligation on the warranty and leave its receiver in a position to purchase the underlying mortgage; but, even of that, there must be grave doubt, in view of the fact that the breach of the warranty and uncertainty arising therefrom may have been one of the causes preventing the issuance and delivery of such bonds. If it was the intention of those manipulating the affairs of both the Bank and the Building Company to take a part of the \$600,000 sought to be realized on the first mortgage of the Building Company's property and pay off the \$70,000 mortgage and thereby make good the Bank's written warranty, it is not perceived that any equities are born to the Bank out of the arrangement, particularly so far as the lien claimants are concerned, for the persons so intending were [320] representing to the lien claimants at all times that the \$600,000, to be realized, was for the completion of the building. The mortgage for \$600,000 was to raise that amount, not less.

The Bank was not a stranger, but its control of the Building Company created, rather, a trust relation. The Building Company was, for many pur-

poses, virtually the agent of the Bank to accomplish one of its purposes, that is, the improvement of its property and the providing it with a banking house.

It is not necessary to consider the inconsistency of the Bank receiver's position in asserting the \$600,000 mortgage based on a title warranted by the Bank and, at the same time, asserting the \$70,000 mortgage, the existence of which breached the warranty on which the value of the \$600,000 mortgage rested. The right of subrogation is an equitable right, and there is no equity in such a contention. The Bank's receiver also asserts the priority of the \$600,000 mortgage held by it, which was issued by the Building Company to a trustee to be placed in raising that amount for the construction of the building.

It is not deemed necessary to determine whether the Bank and Building Company were identical for all purposes or this purpose, or whether the Bank was liable to any extent because of the mortgage, or whether there was actual fraud in the handling of the \$600,000 mortgage. The Court finds from the evidence that, for one purpose, at least, the Building Company was, in substance, the agent of the Bank, to provide it suitable banking quarters, and that anything intended, or done beyond that was incidental thereto. Under these circumstances, whatever the rights of a stranger, who had acquired the mortgage and made advances thereon to a less amount than its face, might be, I conclude that, on account of the trust relation growing out of the Bank's virtual control of the Building Company,

it could not obtain any advantage over the lien claimants by acquiring such mortgage.

I further find that the advances made by the Bank to [321] the Building Company were—except, possibly, the later ones—made, not upon the credit of the \$600,000 mortgage, which it was still sought to dispose of in eastern cities, but that such advances were made upon the strength of an arrangement whereby the Bank was to take certain second mortgage bonds. If the \$600,000 long term mortgage were placed to secure a debt of a lesser amount immediately falling due, it must be held a pledging for a pre-existing debt and void.

Washington State Constitution, Art. XII, Sec. 6;

Farmers Loan & Trust Co. v. San Diego St. Car Co., 45 Fed. 518;

Hemerer et al. v. St. Louis Blast Furnace Co. et al., 212 Fed. 63;

Memphis & Little Rock R. R. Co. v. Dow, 120 U. S. 287; 30 L. Ed. 595;

In re Progressive Wall Paper Company, 224 Fed. 143.

I find no equity in the Bank, or its receiver arising out of these transactions and hold the Bank's receiver a general creditor on account of such advances.

On behalf of the receiver of the Bank it is sought to establish a lien for the purchase price of the property superior to that of the lien claimants. As already pointed out, the Building Company was a company organized and controlled by the Bank to

improve its property and secure for itself a banking-house. Under these circumstances, such a contention must fall; but this is not the only reason. The arrangement appears to have been that the Bank would take from the Building Company, in payment for the property, a portion of the \$750,000 issue of second mortgage bonds, which were never issued. It was the balance of these bonds, that was to secure the \$400,000 which the Building Company was representing—when it contracted with the lien claimants—had been provided, along with the money to be raised on the \$600,000 mortgage for the completion of the building. There having been a failure to provide the money represented as provided and available, [322] and the deed to the property being a warranty deed, it would be inequitable to establish the priority of a purchase money lien over the other lien claimants. Reaching this conclusion, it is not necessary to consider the other questions which have been urged upon this phase of the case.

It has been contended on behalf of the lien claimants that they are entitled to judgment against the Bank, as well as against the Building Company. While in certain particulars the Building Company is to be considered merely as the agent of the Bank, yet the property of the Building Company, which it was represented to have, still remains to be applied in satisfaction of any established claims. It is true that the representations that \$600,000 had been secured upon the first mortgage and that \$400,000 additional was available were incorrect. Still the

representations fall short of such a fraud on the part of the Bank and its agent as would authorize the Court in holding that the debt created was a debt of the Bank, as well as the Building Company. These were not representations that the Building Company owned property which it did not own, but are rather to be considered as that it had obtained credit, a part of which was secured upon such property, which it did not actually have.

The fact that construction under the contract was not completed renders it necessary, in the case of a number of claims, to adopt some other measure of recovery than the contract price, the most equitable is to approximate, as nearly as possible, the value of that which was furnished and done in partly completing the contract, having primarily in view the contract price and the relative proportion of the contract performed. But adopting this rule does not in any way affect the ranking of the lien claimants, or give them material or labor liens, instead of that of a contractor.

The following is a statement of the amounts of recovery fixed and allowed, the rank of the liens and the attorneys' fees allowed: [323]

Judgment and labor lien will be decreed the following claimants in the following amounts:

N. A. Hansen.....	\$59.90
A. J. Van Buskirk.....	59.90
C. W. Crouse.....	49.92
F. L. Swain.....	59.90
D. A. Trolson.....	59.90
Fred Gustafson.....	59.90

E. Scheibal.....	59.90
Paul Scheibal.....	59.90
F. J. Kazda.....	59.90
W. Donnellan.....	59.90
P. Hagstrom.....	54.90
Arthur Purvis.....	59.90
Roy Farnsworth.....	59.90
C. B. Dustin	59.90
L. J. Pettifer.....	59.90
Charles Bond.....	59.90
L. H. Broten.....	59.90
W. Canaday.....	49.92
L. R. Lilly.....	59.90
F. McNair.....	59.90
Dave Shields.....	59.90
Ed Lindberg.....	44.53
Joe Tikalsky.....	48.88
F. Mente.....	44.13
C. Gustafson.....	38.89
George Larson.....	44.14
F. Marcellino.....	30.66
M. Swanson.....	24.23
William Griswold.....	41.88
O. E. Olson.....	58.38
C. I. Hill.....	8.97
Emil Johnson.....	6.98
C. Peterson.....	41.88
F. A. Fetterly.....	42.63
Earl Whitford.....	44.13
Thomas S. Short.....	59.90
George W. Hicks.....	41.88

Attorney's fee allowed, \$925.

Judgment and labor lien will be decreed F. R. Schoen for \$198, and a lien for materials, \$10.80. Attorney's fee, \$40.

Judgment and labor liens will be decreed on account of labor performed by the following named persons in the various amounts stated:

A. E. Smith.....	\$41.88
J. H. Ehret.....	11.97
John Gallagher.....	8.97
Pat Keenan.....	54.13
H. R. Doremus.....	41.88
R. Davey.....	41.88
L. A. Williams.....	11.97
David Bain.....	41.88
P. J. Bergsten.....	17.45
Charles Nichols.....	10.10
E. H. Geister.....	11.91
Roy Hix.....	55.88
[324]	
Fred Denham.....	\$55.88
Harry R. Pitcher.....	51.88
John Blixt.....	55.88
John Hampson.....	41.88
J. S. Kelly.....	35.90
C. A. Anderson.....	11.97
L. J. Hunt.....	46.39
B. F. Wells.....	11.97
C. Colburn.....	9.35
Robert Comar.....	41.88
J. F. Brislin.....	54.89
Erich Holmer.....	42.26
John Lentz.....	8.97

J. M. Collins.....	38.89
W. S. Snyder.....	58.21
C. O. Bodum.....	9.72
W. Tabor.....	49.38
M. P. Jones.....	8.97
Dan Haley.....	35.90
Henry Poff.....	8.97
C. A. Carlson.....	51.88
H. Simons.....	55.88
Bert Morton.....	8.97
H. J. Ramsey.....	55.88
W. P. Wells.....	55.88
J. H. Calhoun.....	11.97
Ed Hobson.....	13.47
N. L. Morris.....	55.88
Andrew Bratton.....	56.88
D. E. Kennan.....	11.97
W. K. Herendeen.....	8.97
F. H. Madsen.....	95.34
Roger E. Chase.....	107.25
David L. Glenn.....	18.00
W. M. House.....	47.89
S. Rounsley	41.88
I. Lorass.....	49.38
J. M. Kryci.....	55.88
A. Johnson.....	41.88
F. N. Bergen.....	41.88
C. Olson.....	41.89
Samuel Rothstein.....	13.33

\$14.80 is allowed for the expense of filing these
liens and an attorney's fee of \$1,000 is allowed

Judgment and a materialman's lien will be decreed upon the claim of the Puget Sound Iron & Steel Works for \$495.90. While this claim has been asserted as a labor lien, yet the work was done away from the building at claimant's shop upon material brought from the building to the shop and returned to the building. Under these circumstances, the lien should be ranked as a materialman's lien and not as a labor lien. An attorney's fee of \$100 is allowed.

Judgment and labor lien are decreed F. H. Godfrey in the amount of \$750. Attorney's fee of \$125 allowed. [325]

Judgment and labor lien decreed W. L. Owens in the amount of \$11.95. Attorney's fee waived.

Judgment and labor lien decreed C. H. Boedecker in the amount of \$5.95. The fee for filing the lien, 50¢, allowed. Attorney's fee waived.

Judgment and lien for material furnished will be decreed the City Lumber Agency for \$708.54. Attorney's fee, \$125.

Judgment and lien for material furnished by the St. Paul & Tacoma Lumber Company will be decreed in the amount of \$708.33. Attorney's fee \$125, allowed.

Judgment and lien for material furnished will be decreed Hunt & Mottet in the sum of \$462.25, of this amount, \$111.75 represents material for which E. E. Davis & Company, contractors, were primarily liable. Therefore, the payment in full of Hunt & Mottet's bill will reduce the amount hereafter al-

lowed Davis & Company by \$111.75. Attorney's fee of \$100 allowed.

Judgment and materialman's lien will be decreed Savage-Scofield Company for \$9,342.25. Attorney's fee, \$350, allowed.

Judgment and lien for material will be decreed the Henry Mohr Hardware Company in the amount of \$36.84. An attorney's fee of \$25 is allowed.

Judgment and materialman's lien will be decreed the Far West Clay Company for \$22,165.34. Attorney's fee, \$2,500, allowed.

Judgment and lien for material will be decreed the P. & G. Lumber Company for \$40.80. Attorney's fee allowed, \$25.

The Colby Star Iron Works will be allowed to amend its lien and complaint and judgment and lien for material will be decreed in the amount of \$1,770.12. Attorney's fee will be allowed in the amount of \$175.

Crane & Company ask a lien on account of certain water-closet fixtures. This is disallowed because of reasons already stated. It has been urged on behalf of Crane & Co. that the rule should not be applied because one part of each set of fixtures [326] which part was in the evidence called a "Hulbert fitting," had been delivered and installed in the partly constructed building. The Court will not pause to inquire whether there may not be cases where the above rule should be relaxed or an exception made to it, particularly if the part of the fixture not delivered were worthless, or greatly diminished in value if it lacked the part installed, as the part

delivered of such an article would contain certain elements of notice to others interested in the work upon the property, but such is not this case. The Hulbert fitting is, substantially, in the class of a stock fitting which, when furnished, these undelivered water-closets will again be made complete.

The estimate upon which Olsen Company was paid a percentage shows that there is no difficulty in arriving at the value of a Hulbert fitting, apart from the assembled water-closet.

Crane & Company, while an entire contract, will have no lien for the portion not delivered. The Hulbert fittings were delivered and will be allowed at the price billed, \$20, each, and the one water-closet delivered at \$51.15.

Crane & Company are decreed a lien as a materialman for the following items and amounts:

Quantity	Size	Description.	Price.	Total.	
1241-5	½"	Blk. Gen. W. I. Pipe	\$ 6.92	\$ 85.91	
1842-10	1¼	do	17.58	323.97	
1350-0	1½	do	21.02	283.77	
764-0	2½	do	47.00	359.08	
64-1	3½	do	74.11	47.49	
125-10	5	do	118.95	149.67	
134-3	6	do	154.24	207.07	
255-10	8	do	208.16	532.54	
2076-10	¾	do	10.59	219.94	
1463-1	1¼	do	20.17	295.10	
3325-6	1½	do	25.31	841.68	
1182-6	2½	do	54.41	643.49	
148-2	3½	do	85.56	126.77	
768-7	8"	do	178.58	1,372.53	\$5,489.01

1	4"	#1028 Galv. Drg. Y	6.75		5.40
2769' 7"	¾	Blk. Genuine W. I. Pipe	8.80	243.72	
2588-2	1"	ditto	13.00	336.46	
1208-5	2"	ditto	30.45	367.96	948.14

[327] Forwarded \$6,442.55

Forwarded \$6,442.55

Quantity	Size	Description.	Price.	Total.	
832-7	3"	Blk. Gen. W. I. Pipe	\$ 61.96	\$ 515.87	
202-11	4"	ditto	87.58	177.72	
56-11	10"	ditto	226.48	128.91	
2587-6	½"	Galv. Gen. W. I. Pipe	8.62	223.04	
1340-8	1	ditto	15.65	209.81	
1453-4	2	ditto	35.50	515.93	
2806-11	3	ditto	71.65	2,011.16	\$3,782.44

1	3 x 1¼	Galv. Mall. Tee	7.60		
1	3 x 2	ditto	7.60	6.08	
2	3 x 2	Gace Bushings	.70	1.33	7.41

1	6	#1020 Galv. Dr. Ft.	16.50	16.50	
39	6 x 4	1021 ditto	18.50	721.50	
6	6	1028 "	18.50	111.00	
2	6	1001 "	13.15	26.30	
1	6	1003 "	11.00	11.00	
8	4 x 1½	1029 "	7.40	59.20	
2	4 x 3	1029 "	7.40	14.80	
10	4 x 4	1028 "	6.75	67.50	
4	4 x 4	1020 "	6.15	24.60	
87	3 x 1½	1029 "	5.10	443.70	
4	3	1028 "	4.65	18.60	
1	3	1001 "	3.10	3.10	
3	3	1003 "	2.55	7.65	
39	2½ x 1½	1029 "	4.00	156.00	
3	2½	1028 "	3.70	11.10	
5	2	1024 "	2.30	13.80	
18	2	1020 "	1.50	27.00	
35	2	1059 "	3.50	122.50	
20	2	1001 "	1.15	23.00	
30	2	1003 "	1.00	30.00	
120	1½	1024 "	1.50	180.00	
100	1½	1020 "	1.00	100.00	
10	1½	1057 "			
50	1½	1058 "	.70	42.00	
250	1½	1003 "	.67	167.50	
50	1½	1001 "	.72	36.00	
			<hr/>		
38-5%			\$2,434.35	1,433.83	
86		Hulbert Fittings at \$20.00.....		1,720.00	
1		complete water closet		51.15	
6	4" Clo	Galv. Nipples	1.35	5.67	
2	2"	1005 Galv. Drg. Fit.....	1.00	1.60	7.27
			<hr/>		
3	4"	1003 Galv. Drg. 45 Deg. Ells.....	4.00		
5	3"	1003 ditto	2.55	19.80	
24	1½	Galv. Mall. Locknuts .....	.52	5.34	25.14
			<hr/>		
1 Pc	6"	Nat. FW Galv. Pipe 2¼".....	266.00	.61	
2	6"	Threads	1.05	2.10	2.71
			<hr/>		
3	6	#1003 Galv. Dr. Fittings.....	11.00	\$33.00	
1	6	1001 ditto	13.15	13.15	36.92
			<hr/>		

20

1	6 x 4	Blk. Bushing	1.25		1.00
2	6"	Threads (on own pipe).....	1.05		2.10
3 Pcs	6"	Galv. Pipe 0' 3½".....	227.00	\$2.00	
6	6"	Threads	1.05	6.30	8.30
<hr/>					
[328]		Forwarded			\$13,520.82
		Forwarded			\$13,520.82
Quantity	Size	Description.	Price.	Total.	
4	6 x 4	#1021 Galv. Dr. Tees.....	\$18.50	\$74.50	48.10
		35			
2	6"	1000 Galv. Dr. Elbows.....	\$11.00	\$22.	28.60
2	6"	1003 do 45 Deg. "	11.00	22.	
<hr/>					
		35%		\$44.00	28.60
2411-11	4"	Galv. Gen. W. I. Pipe.....	101.39		2,445.45
1	6 x 3	Blk. Bushing	\$ 1.25	5%	1.19
1 Pc	6"	Galv. Pipe 0' 3½" TBE.....	\$266.00	\$.77	
2	6"	Threads	1.05	2.10	2.87
<hr/>					
					\$16,047.03

Attorney's fee allowed, \$2,000.

The Washington Brick, Lime & Sewer Pipe Company makes a claim for a lien upon the ground that, although the material prepared by it was not delivered at the premises, the material was specially prepared for this building and is of very little worth for any other purpose. The lien is denied upon the authority of *Holly-Mason Hdwe. Co. vs. National Surety Company et al.* (107 Wash. 74), and other cases cited.

It is contended that a lien should be allowed for that part of the material shipped from Spokane to Tacoma and stored in the railroad yards at Tacoma. Under the foregoing authority the lien will have to be denied—even though it was shown that the owner had requested the shipment to Tacoma. The Court, however, finds that the shipment was made by claimant, rather to avoid the higher freight rates imminent, than to accommodate the Building Company, although it may have been in part for the latter purpose, and that it never passed to the possession and control of the Building Company.

The contention on the part of the defendant Building Company that a part of the title shipped was discolored is not established. Further evidence will have to be taken to establish the amount of the judgment to which this claimant is entitled, as a satisfactory finding cannot be made upon the evidence already [329] taken as to claimant's damages due to defendant's breach. The attorney's fee being an incident of the lien, the claimant will only recover the statutory attorney's fee of \$15.

McClintoc-Marshall Company, a Pennsylvania corporation, asserts a lien for structural steel. The value of the steel is alleged to have been \$263,437.54; a payment of \$86,805.17 is admitted and \$176,632.37 with interest claimed.

Defendant admits a value of \$260,000; alleges payment of \$87,814.34, and claims an offset because of defective fabrication for the amount of \$3,000; further damage of \$14,052.76, on account of delays in delivery because of freight charges increased pending delivery and \$50,000 because of claimed loss of rentals and interest. The defendant further asserts that the suit cannot be maintained because of an arbitration clause in the contract, defendant denies the jurisdiction of the court on account of liens asserted by interveners where the amount is less than \$3,000.

The Court has heretofore upheld the jurisdiction of the court and found the arbitration provision inapplicable, and that defendant, under the terms of the contract has no right to offset because of loss of rent and interest alleged to have been caused by delays in delivery.

Under the evidence, I conclude that the delays were occasioned by defendant's failure to furnish details and drawings promptly and that no offset is allowed because of increase in freight charges.

The Court finds no evidence of damage to defendant because of defects in fabrication, in excess of that conceded by complainant; to wit, \$2,000. The right to a materialman's lien is established. Attorney's fee allowed, \$12,500.

Judgment will be decreed the Ajax Electric Company for \$203.70, of which a contractor's lien will be decreed them in the amount of \$153.09. Attorney's fee allowed, \$40.00.

Judgment and contractor's lien will be decreed Mullins [330] Bros. for \$319.08. An attorney's fee is allowed of \$30.00.

The H. C. Green Iron Works asserts a labor lien for \$1,395.62, a materialman's lien for \$4,429.68, and admits a credit of \$920.62, leaving a balance due of \$4,904.68. The Court has experienced considerable difficulty in settling the issues upon this claim. The defendant denies the reasonable and agreed value of the labor performed in excess of \$1,000 and denies the reasonable and agreed value of the material furnished in excess of \$4,000.

If these denials as made were treated as admissions of the value up to the amounts mentioned, binding upon the Court, the issue would be much simplified; but, in view of the stipulation on the trial that all claims must be proven, this cannot be done.

At the trial, upon the receiver's admissions, the lien and pleadings were considered as amended to state a claim in the amount of \$4,656.88.

It is held that this claimant did not forfeit a right to lien because of making an excessive claim.

The first contract—a written contract—was for elevator cells and furnishings and window toggles. A later, oral, contract was entered into for furnishing and installing a flag pole for \$1,500. The pole was furnished but not installed. \$750 is allowed for

this flag pole and the lien therefor will take rank as a contractor's lien.

Under the written contract, claimant was to furnish and install all material covered thereby, except the window toggles. It was to furnish these, but was not required to install them. The billed value of these toggles amounted to \$437.50, of which 75% has been paid, leaving a balance due of \$109.35, for which claimant is entitled to a lien with the rank of a materialman's lien. Other material was delivered under this contract to the amount of \$789.50, 75% of which was paid, leaving a balance due of \$197.38, for which claimant is entitled to a lien with the rank of a contractor. The total personal judgment to which claimant is entitled, including the lien items above mentioned, is \$4,656.88. [331] Attorney's fee of \$150 will be allowed.

There are certain features relating to the claim of E. E. Davis & Company which require special consideration. That company had a contract for the erection of the steel, which was almost completely performed at the time of the termination of the building operations. Upon the failure of the Bank and Building Company, Davis & Company were notified by the representative of the Building Company, Mr. Wells, who was the superintendent in charge of operations, to stop work. Davis & Company contend that this effected a rescission of the contract. They sue upon the *quantum meruit* for what they had done. Claimant contends that this works two important changes in what would otherwise result:

That rescission destroyed the reason of the lien waiver provision in the contract. Having already held that the lien waiver would not be enforced for other reasons, it is not necessary to consider what effect, if any, such rescission had upon the waiver provision.

Davis & Company appear further to assert that, as their contract was for the erection of the steel which was almost entirely accomplished by laborers employed and paid by them, that they, to the extent of their pay-roll expenditures, are entitled to be ranked as lienors for labor, rather than contractor-lienors. They appear further to contend that the rescission and their claim to have their pay-roll expenditures so ranked are in some way strengthened or advanced by reason of the rescission and their suit on the *quantum meruit*.

Whatever effect the rescission may have had upon the rights and liabilities of Davis & Company and the Building Company, as between themselves, it is not perceived how it can in any way affect the equities as between Davis & Company and other lien claimants. No part of this claim should rank as other than that of a contractor.

Judgment and contractor's lien will be decreed in the amount of \$30,343.69, less the \$495.90, when paid, already decreed [332] the Puget Sound Iron & Steel Works for straightening certain iron or steel entering into the building which was bent by the falling of a load caused by the breaking of a sling provided by this claimant, which latter is herein ranked as a materialman's lien, and also less

the item, when paid, already allowed herein as part of the Hunt & Mottet lien. An attorney's fee of \$3,500 is allowed.

Under the authority of *Western Hdwe. & Metal Co. vs. Maryland Casualty Co.* (105 Wash. 54), the Tacoma Millwork Supply Company seeks to establish a lien for certain material specially prepared and other material partly prepared for the building, but not delivered upon the building site, but still held in their own plant.

This Company had two contracts which may be briefly described: One to provide material at certain prices, the other to install, or place it in the building at a certain price.

Certain features connected with this claim require special consideration. The Court holds that this claimant did not forfeit the right to its lien by claiming an excessive amount and that neither the fact of examination and approval of the material by Wells, Webber and Drury at the factory, nor that the material was of a character, the delivery of which at the site before time for installation would have greatly damaged it, nor the further fact that certain of the material was primed and painted in claimant's factory or warehouse by another contractor changes the rule, already announced herein, for there is nothing in the statute to show an intent to make any exception as to what would constitute furnishing or delivery.

The Court further holds that the question of delivery, involved under this claim, is not affected by this claimant's delivering the key of the ware-

house where the material was stored to the receiver after his appointment, Claimant's counsel has argued:

“The contract itself says that the material shall be taken off the hands of the Mill Company as rapidly as manufactured. The owner to provide dry storage space. This appears in the proposals attached to the contract. The testimony further goes to show that in talking with Webber who was in full charge of operations, it was found [333] around October, November and December that the building was not far enough along to take into the various parts mentioned; that it was then arranged that the Mill Company would get some dry storage space the rentals to be adjusted by Webber at the conclusion of the contract, and would store whatever it could for the Company at its own warehouse at the plant; that payments were made both on that stored in the warehouse and that stored at the plant as well, and of course, upon those frames stored and delivered into the building; that Wells several times came to the warehouse and the factory and accepted all of the material mentioned; that several times R. T. Davis urged Wells and Webber to take this material off their hands and put it on the building; that Wells particularly, as late as the first two days in January told Davis that he would have to hold it for them that they had no place in the building and that it would be damaged.”

While the conduct above described would amount to a recognition of liability by defendant because of delays and inability to receive the material at the building being constructed, it does not amount to, or take the place of requisite delivery or furnishing material contemplated in the lien statute. Delivering or furnishing material at the building and the work done upon it not only affords the other potential lienors knowledge of the enhanced value of the property by reason thereof, but affords notice to them and warning of what is being placed against the property by way of charges or liens—a warning and notice not afforded by the storage or acceptance of material elsewhere.

The Court holds that the contract provision for a \$50 penalty for delay in performance does not affect the question of a right to, or want of lien in this case for not delivering the material and it is further held that nothing in the nature of a purchase money lien would be created as long as the seller retained possession of the material for, as long as he did so, he would not need it. (*Hunter vs. Blanchard*, 18 Ill. 318; 68 Amer. Dec. 547).

Under the \$30,000 erection contract, claimant's testimony was that the actual work done amounted to \$6043. The work going to make up this item is described in the testimony as follows:

“Q. If you had been furnishing sash, for instance, on that building, and it did not fit, you would be billed back for the additional cost, wouldn't [334] you, for making it fit?

A. I am not speaking of the fit of the sash. I am speaking of the additional work that would ordinarily be done on the building, such as trimming off the stiles of the sash, and also trimming off the bottoms of the stiles and seeing that those fit in there without any much further work. Ordinarily there will be considerable work on the building, taking these sash as they were often delivered, fitting them into these frames. Then again we built up the window casings, we mitered them together and glued them up, and also the door casings, so that we would save ourselves that expense on the building and facilitate the work.

Q. What did that \$65,000 contract cover?

A. That covered just the furnishing of the bare materials."

While the window casings or frames mentioned in this testimony were delivered, the sash mentioned were not delivered. Both were called for by the contract for material. As long as the value of such work on the sash is not segregated from that work on the frames, the entire item will be disallowed as not lienable under the proof. An item of profit under this contract, asserted as lienable, is also denied.

Under the contract for material upon 831 window frame openings manufactured by this claimant, billed at \$8310, there was paid \$6232.50. The evidence shows that of these, 691 were actually delivered and payments made should be applied *pro rata* upon those delivered and those undelivered.

While the various sizes of these frames may afford evidence of some difference in value, yet, by reason of the fact that the work of fashioning the frames far exceeds the value of the material in the frames—together with the further fact that 680 of these frames were billed or estimated at \$6800 and 151 of them were billed or estimated at \$1510—convinces the Court that a fair valuation on the 691 frames and openings delivered would be \$6910. Prorating the total payment, \$6232.50, shows a payment of \$7.50 upon each frame or opening, leaving unpaid on each \$250, or a total upon those delivered (691) of \$1727.50, for which this claimant is entitled to a materialman's lien. Nothing will be added thereto by way of profit claimed. [335] Attorneys' fee fixed at \$350.

A personal judgment under the first contract in the amount of \$6043 will be allowed.

There is testimony that, under the material contract, the material was 90% complete. There is other testimony that 100% of the material was furnished and 40% of the work done on it; but I am unable to reach a satisfactory conclusion under the testimony upon the question of the amount for which claimant is entitled to a personal judgment. The question will be settled after argument upon settling of the decree.

Ben Olson Company asserts a lien for \$49,686.10. It will be necessary to hear further argument in order to determine the exact amount for which that Company is entitled to recover a personal

judgment, as I have been unable to reconcile the various figures and statements.

No part of this Company's claim would be entitled to be given the status of a laborer's lien. A contractor furnishing labor and material, or material should not, by reason of that fact, be changed from the status of a contractor to that of a materialman, or labor lien claimant.

The following have been established as offsets or deductions to the lien items claimed:

Paid by defendant to Olson Company, \$12,470.11.

After suit was started, Olson Company was allowed to withdraw certain material already delivered by it to the building site.

As between the lien claimants, equity requires that these payments be applied on lien items not so recovered.

Olson Company will only be allowed for one water closet installed and \$20 for each Hubert fitting, with 15% profit thereon as a reasonable allowance to be added to the \$20 for advance of the jobber or retailer over and above the wholesale price established by Crane & Company. [336]

All, or substantially all of the Crane & Company lien overlaps that of Olson Company. A deduction must be made from the latter upon this account. The question remains as to the amount of the deduction. While not entirely clear, I find that the preponderance of the evidence shows the overlap to be complete. On account of the application of payments made to Crane & Company by Olson Company, it results that no part of the al-

allowable lien items of Olson Company, supplied by Crane & Company has been paid for by the former company, yet they are charged by Olson Company to the defendant at 50% advance over the price charged and lienied by Crane & Company. Such a charge for goods, payment for which has not been made, is unconscionable, at least so far as other lien claimants are concerned.

Olson Company took the contract for \$91,000, \$1000 representing the agreed value of old radiators, of which \$8,000 has been figured as an allowable profit. Taking this as an admission as to what would constitute a real profit, I conclude that any profit in excess of 15% to be allowed Olson Company for material supplied by Crane & Company and held lienable would be unreasonable and extortionate. It will be further noted that, because of the default of the defendant and Olson Company in not paying Crane & Company, the latter have brought suit and an attorney's fee has been incurred by them in the amount of \$2,000. As between Olson & Company and the other lien claimants, that is an item that should be applied in reduction of Olson Company's lien items established, or at least postponed until the allowed liens of other claimants have been paid. On account of the evidence of extravagant charges for material afforded by the foregoing, I hold that no profit should be allowed or added to the items as charged by this claimant. No lien being established, no attorney's fee will be allowed, other than the statutory fee of \$15.00. The amount of the foregoing deductions exceeds the

value of all material delivered by Olson Company not removed. [337]

Judgment and contractor's lien will be decreed the Otis Elevator Company for \$642.45. Attorney's fee allowed \$125.

The Edward Miller Cornice and Roofing Company seeks a recovery in the total amount of \$5599.10 and to establish a lien under two contracts, one for furnishing certain windows, and the other for furnishing and installing roofing and sheet metal. The Company also seeks to establish a lien for \$16.10 for material which was furnished and \$43 for labor. As to those last two items—\$16.10 is allowed as a materialman's lien and the \$43 is allowed as a contractor's lien.

While there are certain general expressions in the first of these two contracts mentioned that, alone considered, might justify the ranking of the claims under such first contract as a contractor's lien, yet, under the particular provisions of the contract, I find that material actually furnished thereunder would entitle claimant to have his lien ranked as a materialman's; but there was no material actually furnished or delivered at defendant's building under the first contract, although a material amount was secured and partly prepared at complainant's shop.

The second contract provided for the payment of a lump sum for material and the installation of it. Therefore, any claim established under it must be ranked as a contractor's lien.

Under the second contract, work and material

entered into the building in the amount of \$1080 on which \$810 was paid, leaving a balance of \$270 for which claimant is entitled to a lien ranked as a contractor's lien.

On account of the damage incurred upon sundry items, claimant is entitled to a further judgment of \$1600, made up as follows:

On account of difference in the	
price of roofing secured	\$150.00
Same, account of copper	200.00
Same, account of skylight glass	50.00
Same, account of window glass ..	600.00
Same, account of galvanized iron..	600.00
[338]	————— \$1600.00

Attorney's fee, \$175, allowed.

Mr. Haskell was appointed receiver of the Bank by the State Court and thereafter as receiver of the defendant Building Company herein by this Court. The appointment by this Court was made upon the assurance of the receiver that, if appointed, he would charge no fee as receiver herein. As receiver of the Bank, his counsel, appointed herein upon his request, was already employed by him in the receivership in the state court. No authority to employ counsel was asked of this court; nor request made to fix the compensation of counsel. Nor was the question of a compensation, other than stated above, called to the Court's attention, although authority at the time of the appointment of the receiver was asked and given to employ caretakers and assistants to protect the property during the receivership.

Under these circumstances, the Court finds that the understanding that there would be no fees asked or allowed the receiver contemplated the services of his counsel as well. No fees will be allowed the receiver's attorney.

While the Court has decided that a lien, if any, of the \$70,000 mortgage should be postponed to all mechanics, materialmen and contractors' liens established herein, the Court has refrained from deciding whether it should be subordinated to any general judgments of lien claimants over and above the established statutory liens, as the question has not been raised or discussed.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 31, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [339]

**Exceptions of Tacoma Millwork Supply Company
to Memorandum Opinion.**

To His Honor Judge CUSHMAN:

The undersigned, Tacoma Mill Work & Supply Company, a partnership, through its attorneys, Flick & Paul, respectfully submits the following exceptions to the memorandum decision filed in the foregoing case as of date of March 31, 1922, received in this office April 3, 1922.

I.

That the Mill Work Company excepts to each and every finding made in said decision aside from those hereinafter specifically excepted.

II.

The Mill Work Company excepts to the findings or conclusions of the Court on pages 3, 4 and 5 to the effect that claims of lien for material not actually delivered to the building are denied.

III.

The Mill Work Company accepts the decisions with relation to holding on waivers of lien in so far as it affects this partnership.

IV.

The Mill Work Company accepts the holding of the decision in relation to the \$70,000 mortgage in so far as it [340] affects this partnership.

V.

The Mill Work Company accepts the Court's holding with relation to the \$600,000 mortgage and advances thereunder.

VI.

The Mill Work Company excepts to that portion of the decisions found on page 10 with relation to its holding that the representation with relation to the available funds, etc., were not fraud on the part of the Bank.

VII.

The Mill Work Supply Company especially excepts to any allowances made in this decision that any other claimants in its same class or to any than those who are prior in law as a preferred class.

VIII.

The Mill Work & Supply Company accepts the holdings of the Court on the question of arbitration.

IX.

The Mill Work & Supply Company excepts to the findings on page 20 with relation to this partnership to the effect that the material was still on hand at their own plant; and further excepts to the finding that examination and approval of the material by agents of the building company that the delivery at the site before time of installation would have greatly damaged it or its priming and painting at plaintiff's factory or warehouse by another contractor does not constitute a furnishing or delivery in that it does not take into consideration that the direction and order to hold it in a warehouse, when offer of delivery was made, was a direction and order made by the Building Company itself and does not take into consideration that such direction and order was given at a time when a large [341] part of the material was complete and ready for delivery, and that this impeded the completion of the small percentage not yet completed and that this order was given long before the offer of the key to the warehouse, to the receiver after his appointment, and does not take into consideration the offer of material in the pleadings and in open court without qualification, and does not take into consideration the fact that this is special material to be used and usable only in this building and of no value otherwise, and does not take into consideration the fact that it was the Building Company's order that kept the material from placement upon the site, and that said order

was against the wish and the interest of the Mill Company.

X.

The Mill Work Company excepts to each and all of the findings on said pages and prior and following pages which hold that the failure of placement of this material on the site is a necessary incident to a lien, and further excepts to a failure to find that the orders to hold it off the premises were the orders of the Building Company and that the direction to place these especially prepared materials in storage were the orders of the Building Company.

XI.

The Mill Work Company especially excepts to the finding on page 21 and 22 disallowing for the window casings and frames mentioned as having been delivered upon the building.

XII.

The Mill Work & Supply Company excepts to the findings found on page 22 with reference to the 831 window frame openings manufactured by claimant and stated as having been billed at \$8310, and to the matter of computations, and to the allowance of \$1727.50 and also excepts to the attorneys' fee fixed at \$350, and especially [342] excepts to the crediting of the amount paid upon lienable items as distinguished from the nonlienable items, in view of the fact that the Mill Work Company credited said items upon material at the factory which this Court now holds as nonlienable; and for the further reason that the payments made were made many

times before the delivery of the particular windows now referred to on page 22 of said decision, and for the further reason that the very window frames paid for by the \$8310 are now in storage with the exception of 98 which were removed from the storage or the paid window frames to said building.

XIII.

The Mill Work Company excepts to the allowance of a personal judgment as distinguished from a lien judgment for \$6043 referred to on page 22, and excepts to that portion of the findings in the decision at page 23 which suggests that there was testimony that only forty per cent of the entire work was done, when in truth the testimony shows that about forty per cent on some remaining doors at the factory as to work was done; and excepts to the failure to allow for 11 window frames delivered in the Bank which were store front window frames of a very large and expensive pattern approximating in value about \$1100, which is included in the \$1957, known as the Bank contract, and for the failure to allow anything for the balance of said contract all of which was completed and ready for delivery and tender for which was made under the evidence long prior to appointment of receiver and prior to failure of said Building Company; and further excepts to the failure of the Court to find in favor of the Mill Work Company as to Exhibit "E," amounting to \$200, 80 pieces of scaffold bucks which were delivered at the building prior to December 7th, 1920. [343]

XIV.

The Mill Work & Supply Company further ex-

cepts to the findings in that they do not give a lien in full for all material finished and practically finished and held at the warehouse at the instigation of the Building Company, and for the further reason that tender was made not only to the Building Company by the receiver and to this Court unqualifiedly of this material, but an offer was made in open court that this Court might by a simple order affix the title of all this material in the Building Company for the receiver.

FLICK & PAUL,

Attorneys for Lien Claimant Tacoma Mill Work &
Supply Company.

Exceptions allowed.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Apr. 7, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [344]

Decree.

This cause having come on regularly to be heard upon the bill of complaint heretofore filed in the above-entitled cause, and the exhibits attached thereto, and upon the several answers to the said bill of complaint filed herein by the several defendants, and upon the several cross-complaints of the defendants, and upon the several orders, papers and proceedings entered or filed in this cause, and upon

the evidence and testimony heard in open court, the complainant McClintic-Marshall Company appearing by their solicitors, Hayden, Langhorne & Metzger, and the defendant Scandinavian-American Building Company appearing by Forbes P. Haskell as receiver and by his solicitors Guy E. Kelly, Thomas MacMahon and Frank D. Oakley, and the defendants Scandinavian-American Bank of Tacoma, Washington, and John P. Duke as Supervisor of Banks of the State of Washington and as successor in office to the defendant Claude P. Hay as State Bank Commissioner for the State of Washington, appearing by their solicitors Frank D. Oakley, Guy E. Kelly and Thomas MacMahon, and the defendant Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company, appearing by their solicitors Flick & Paul, the defendant Savage-Scofield Company, a corporation, appearing by its solicitors Fitch & Arntson, the defendant Puget Sound Iron & Steel Works, a corporation, appearing by its solicitors [345] Bates & Peterson, the defendant E. E. Davis & Company, a corporation, appearing by its solicitor James W. Reynolds, the defendant St. Paul & Tacoma Lumber Company, a corporation, appearing by its solicitor H. S. Griggs, the defendant Far West Clay Company, a corporation, appearing by its solicitor R. S. Holt, and the

defendants Henry Mohr Hardware Company, Inc., a corporation, and Hunt & Mottet, a corporation, appearing by their solicitor W. W. Keyes, and the defendant Edward Miller Cornice & Roofing Company, a corporation, appearing by its solicitor Walter M. Harvey, and the defendant Washington Brick Lime & Sewer Pipe Company, a corporation, appearing by its solicitors Charles P. Lund and Davis & Neal, and the defendant Otis Elevator Company, a corporation, appearing by its solicitors Bogle, Merritt & Bogle, and the defendant Colby Star Manufacturing Company appearing by its solicitors Grosseup & Morrow, and the defendant Crane Company, a corporation, appearing by its solicitor Walter S. Fulton, and the defendant Ben Olson Company, a corporation, appearing by its solicitors Stiles & Latcham, and the defendant H. C. Greene, doing business as H. C. Greene Iron Works, appearing by his solicitor H. A. P. Meyers, and the defendants Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company, appearing by their solicitor E. N. Eisenhower, and the defendants H. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency, appearing by their solicitors Burkey, O'Brien & Burkey, and the defendant J. D. Mullins, doing business under the firm name [346] and style of J. D. Mullins Bros., appearing by his solicitors Teats, Teats & Teats, and the defendants S. J. Pritchard, C. H. Graves and Emma Graves, copartners doing business under the firm name and

style of P. & G. Lumber Company, appearing by their solicitors Grosseup & Morrow, and the defendant Morris Kleiner, doing business as Liberty Lumber & Fuel Company, appearing by his solicitor Louis Muscek, and the defendants N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short and George W. Hicks, appearing by their solicitors Charles Bedford, and the defendant Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal, appearing by their solicitor L. R. Bonneville, and the defendant F. R. Schoen appearing by his solicitor DeWitt M. Evans, and the defendant C. H. Boedecker and William L. Owen, appearing by their solicitor S. E. McAnally, and the defendant F. H. Godfrey appearing by his solicitors Stiles & Latcham, and the defendant W. E. Morris appearing by his solicitors Hartman & Hartman, and the said cause having been fully argued by counsel for said respective parties, and the Court having taken same under advisement and having fully considered [347] the entire record in said cause and the arguments of

counsel, and being fully advised in all and singular the premises herein.

DOTH NOW ORDER, ADJUDGE AND DECREE AS FOLLOWS:

I.

That this Court has jurisdiction of all of the parties to this cause, and of the subject matters therein involved; that McClintic-Marshall Company, the complainant herein, at the time of the commencement of this suit was and now is a corporation created and existing under and by virtue of the laws of the State of Pennsylvania, and at the time of the commencement of this suit was and now is a citizen and resident of the State of Pennsylvania, and that the defendants Scandinavian-American Building Company, Scandinavian-American Bank of Tacoma, Washington, Savage-Scofield Company, Puget Sound Iron & Steel Works, E. E. Davis & Company, St. Paul & Tacoma Lumber Company, Far West Clay Company, Henry Mohr Hardware Company, Inc., Hunt & Mottet, Edward Miller Cornice & Roofing Company, Washington Brick, Lime & Sewer Pipe Company, Colby Star Manufacturing Company, Ben Olson Company, at the time of the commencement of this suit were and now are and each of them then was and now is a corporation created and existing under and by virtue of the laws of the State of Washington, and at the time of the commencement of this suit they and each of them were and they now are citizens and residents of the State of Washington; that the defendant Crane Company at the time of the commencement

of this suit was and now is a corporation organized and existing under and by virtue of the laws of the State of [348] Illinois, and at the time of the commencement of this suit was and now is a citizen and resident of the State of Illinois; that the defendant Otis Elevator Company at the time of the commencement of this suit was and now is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and at the time of the commencement of this suit was and now is a citizen and resident of the State of New York, having its principal place of business in the city of New York and State of New York; that the defendant Hattie Davis Tennant at the time of the commencement of this suit was and now is a resident and citizen of the State of California; and that each and all of the remaining individual defendants at the time of the commencement of this suit were and now are residents and citizens of the State of Washington; that the defendants R. T. Davis, Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, were at the time of the commencement of this suit and now are copartners doing business under the name and style of Tacoma Millwork Supply Company; that the defendant Claude P. Hay was, at the time of the commencement of this suit, State Bank Commissioner for the State of Washington, but has been succeeded in office by John P. Duke, who is now the Supervisor of Banks of the State of Washington, and

succeeded to all of the rights, powers and authorities of the defendant Claude P. Hay as State Bank Commissioner; that the defendant Forbes P. Haskell, at the time of the commencement of this suit was and now is Deputy State Bank Commissioner for the State of Washington, in charge of the liquidation of the affairs of the Scandinavian-American [349] Bank of Tacoma, Washington, and that said Forbes P. Haskell was, by order of this Court during the pendency of this suit, appointed Receiver of the property and assets of the defendant Scandinavian-American Building Company, a corporation, and is now the duly qualified and acting Receiver of the property and assets of said defendant corporation; that the defendant H. C. Greene was at the time of the commencement of this suit and now is doing business under the firm name and style of H. C. Greene Iron Works; that the defendants Carl Gebbers and Fred S. Haines were at the time of the commencement of this action, and now are, copartners doing business under the firm name and style of Ajax Electric Company; that the defendant H. O. Matthews and Frank L. Johns were at the time of the commencement of this action and now are copartners doing business under the firm name and style of City Lumber Agency; that the defendant J. D. Mullins, at the time of the commencement of this suit was and now is doing business as J. D. Mullins Bros.; that the defendants S. J. Pritchard, C. H. Graves and Emma Graves were at the time of the commencement of this action and now are, copartners doing

business under the firm name and style of P. & G. Lumber Company; that the defendant Morris Kleiner was at the time of the commencement of this action and now is doing business under the firm name and style of Liberty Lumber & Fuel Company; that the defendant Theodore Hedlund was at the time of the commencement of this suit and now is doing business under the firm name and style of Atlas Paint Company; and that the [350] defendants Robert M. Davis and Frank C. Neal were at the time of the commencement of this suit and now are copartners doing business under the firm name and style of Davis & Neal; that this suit was so commenced to enforce a legal or equitable lien or claim to real property located within the Western District of Washington and the Southern Division thereof, and that all the material allegations of the bill of complaint herein relating to the matters affecting the jurisdiction of this court, are true, and that the value of the matter in dispute in this cause exceeds the sum of \$3,000, exclusive of interest and costs.

II.

That the defendants United States Machine & Engineering Company, a corporation, Tacoma Shipbuilding Company, a corporation, Sherman Wells, Carl J. Gerringer, George Gerringer, A. W. Aufang, and J. A. Soderberg, doing business as West Coast Monumental Company, were each of them duly and regularly served with subpoenas issued in this cause after the filing of the complaint herein, and stipulated and agreed to appear in this suit

within twenty days after the service upon them of a copy of the supplemental and amended complaint of the complainant, but failed so to do, and that an order taking the said bill *pro confesso* against said defendants and each of them was duly entered on the — day of October, 1921, and that no proceedings have been had or taken by said defendants or any of them since the entry of said order, and that more than thirty days have elapsed since the entry of said order; and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as to said defendants that they have not, nor has any of them, any right, title, estate or interest whatsoever in and to the real [351] property hereinafter described, and that as to said defendants the complainant is entitled to the relief prayed for in its amended and supplemental bill of complaint.

III.

That at the time of the commencement of this suit defendant Scandinavian-American Building Company was and now is the owner of the following described real property situate in Pierce County, Washington, and within the Western District of Washington, Southern Division, and more particularly described as follows:

Lots ten (10), eleven (11) and twelve (12), in Block ten hundred three (1003), as the same are shown and designated upon a certain plat entitled, "Map of New Tacoma, W. T.," which was filed for record in the office of the Auditor

of Pierce County, Washington Territory, February 3, 1875,

together with all the hereditaments and appurtenances thereto belonging, and the rents, issues and profits therefrom arising or in any manner appertaining.

IV.

That heretofore and within one year prior to January 15, 1921, the defendants in this paragraph named, performed labor for and at the instance of the defendant Scandinavian-American Building Company upon its building located upon the real property hereinabove described, of the reasonable value and amount set opposite their respective names following, to wit:

N. A. Hansen.....	\$59.90
A. J. Van Buskirk.....	59.90
C. W. Crouse	49.92
F. L. Swain.....	59.90
D. A. Trolson.....	59.90
Fred Gustafson.....	59.90
E. Scheibal	59.90
Paul Scheibal	59.90
F. J. Kazda	59.90
W. Donnellan	59.90
P. Hagstrom	54.90

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Arthur Purvis	59.90
Roy Farnsworth	59.90
C. B. Dustin	59.90
L. J. Pettifer.....	59.90
Charles Bond	59.90

L. H. Broten.....	59.90
W. Canaday	49.92
L. R. Lilly	59.90
F. McNair	59.90
Dave Shields	59.90
Ed Lindberg	44.53
Joe Tikalsky	48.88
F. Mente	44.13
C. Gustafson	38.89
George Larson	44.13
F. Marcellino	30.66
M. Swanson	24.23
William Griswold	41.88
C. E. Olson.....	58.38
C. I. Hill.....	8.97
Emil Johnson	6.98
C. Peterson	41.88
F. A. Fetterly.....	42.63
Earl Whitford	44.13
Thomas S. Short.....	59.90
George W. Hicks.....	41.88

and that by reason thereof there became due and owing to said defendants and to each of them from the defendant Scandinavian-American Building Company, the amount specified, and each of said defendants is hereby awarded and decreed a judgment against the defendant Scandinavian-American Building Company for the amount specified, with interest at six per cent per annum from January 15, 1921, until paid, and for their costs and disbursements taxed in the sum of \$10.00, and that the said defendants and each of them, within ninety

days after the cessation of the labor performed by them upon the real property herein described executed and caused to be filed in the office of the Auditor of Pierce County, Washington, a due and proper notice of claim of lien, and thereafter, within the time prescribed by the laws of the State of Washington, commenced suit in this court and cause to establish and foreclose their said claims of lien, and that in said [353] proceeding they were obliged to and did employ an attorney and solicitor, the reasonable value of whose services is decreed to be \$925.00, and that said defendants and each of them have a valid and subsisting labor lien upon the real premises hereinabove described, to secure the payment of the several sums for which judgment is here rendered in their favor and against the Scandinavian-American Building Company, and also to secure an attorney's fee of \$25 for each lien, aggregating a total attorney's fee of \$925.

V.

That heretofore and within one year prior to January 15, 1921, the individuals in this paragraph named performed labor for and at the instance of the defendant Scandinavian-American Building Company upon its building upon the real property hereinabove described, of the reasonable value and amount set opposite their respective names, to wit:

A. E. Smith.....	\$41.88
J. H. Ehret.....	11.97
John Gallagher	8.97
Pat Keenan	54.13
H. R. Doremus.....	41.88

R. Davey	41.88
L. A. Williams	11.97
Davis Bain	41.88
P. J. Bergsten	17.45
Charles Nichols	10.10
E. H. Geister.....	11.91
Roy Hix	55.88
Fred Denham	55.88
Harry R. Pitcher	51.88
John Blixt	55.88
John Hampson	41.88
J. S. Kelly	35.90
C. A. Anderson.....	11.97
L. J. Hunt.....	46.39
B. F. Wells.....	11.97
C. Colburn	9.35
Robert Comar	41.88
J. P. Brislin	54.89
Erich Holmer	42.26
John Lentz	8.97
J. M. Collins.....	38.89
W. S. Snyder.....	58.21

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C. O. Bodun.....	9.72
W. Tabor	49.38
M. P. Jones.....	8.97
Dan Haley	35.90
Henry Poff	8.97
C. A. Carlson	51.88
H. Simons	55.88
Bert Morton	8.97
H. J. Ramsey.....	55.88

W. P. Wells.....	55.88
J. H. Calhoun.....	11.97
Ed Hobson	13.47
H. L. Morris.....	55.88
Andrew Bratten	56.88
D. E. Kenan.....	11.97
W. K. Herendeen.....	8.97
F. H. Madsen.....	95.34
Roger E. Chase	107.25
David L. Glenn.....	18.00
W. M. House.....	47.89
S. Rounsley	41.88
I. Lerass	49.38
J. M. Kryci	55.88
A. Johnson	41.88
F. N. Bergen.....	41.88
C. Olsen	41.89
Samuel Rothstein	13.33

and that thereafter and within ninety days after the cessation of the performance of said labor, said individuals and each of them executed and caused to be filed in the office of the Auditor of Pierce County, Washington, a proper notice of their claim of lien upon said real property for the value of the labor thus performed, and thereafter, for a valuable consideration they and each of them duly assigned all their claims against the defendant Scandinavian-American Building Company, including their several and respective claims of lien upon the real property in said claims specified, and hereinabove described, to the defendants Robert M. Davis and Frank C. Neal, copartners as Davis &

Neal, and that said defendants Robert M. Davis and Frank C. Neal, within the time limited by the laws of the State of Washington, commenced in this court and cause an action to establish and foreclose said claims of lien and that by reason thereof said defendants Robert M. Davis and [355] Frank C. Neal be and they are hereby decreed to have and recover judgment against the defendant Scandinavian-American Building Company for the aggregate sum of \$1,971.27, together with interest amount to \$140.45, and for the further sum of \$14.80 expense incurred in the filing of said claims of lien, and for an attorney's fee of \$1,000 which is decreed to be a reasonable attorney's fee, and for their costs taxed herein in the sum of \$7.00, and that said defendants Robert M. Davis and Frank C. Neal, copartners as Davis & Neal, have a valid and subsisting labor lien upon the real property hereinabove described, to secure the payment of all sums for which judgment is hereby decreed in their favor.

VI.

That within one year prior to January 15, 1921, the defendant F. H. Godfrey performed labor for and at the instance of the defendant Scandinavian-American Building Company upon its building situate upon the real property hereinabove described, of the reasonable value of \$750, and thereafter and within ninety days after the cessation of the performance of said labor, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said

defendant Scandinavian-American Building Company, and said real property, and thereafter and within the time limited by the statutes of the State of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said defendant F. H. Godfrey be and he is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$750, together with interest amounting to \$57.87, and for an attorney's fee of \$125, which is [356] expressly decreed to be reasonable, and for his costs and disbursements taxed herein in the sum of \$10.00; and further that said defendant F. H. Godfrey has a valid and subsisting labor lien upon the real property hereinabove described, to secure the payment of all sums for which he is hereby awarded a judgment.

VII.

That within one year prior to January 15, 1921, the defendant W. L. Owens performed labor for and at the instance of the defendant Scandinavian-American Building Company upon its building situate upon the real property hereinabove described, of the reasonable value of \$11.95, and thereafter and within ninety days after the cessation of the performance of said labor, executed and cause to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company, and said real property, and thereafter and within the time limited by the statutes of the State of Washington, commenced suit

in this court and cause to establish and foreclose said lien, and that by reason thereof said defendant W. L. Owens be and he is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$11.95, together with interest amount to 85 cents, without any attorney's fee, the same being waived, and for his costs and disbursements taxed herein in the sum of \$1.00; and further that the said defendant W. L. Owens has a valid and subsisting labor lien upon the real property hereinabove described, to secure the payment of all sums for which he is hereby awarded a judgment. [357]

VIII.

That within one year prior to January 15, 1921, the defendant C. H. Boedecker performed labor for and at the instance of the defendant Scandinavian-American Building Company upon its building situate upon the real property hereinabove described, of the reasonable value of \$5.95, and thereafter and within ninety days after the cessation of the performance of said labor, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company, and said real property, and thereafter and within the time limited by the statutes of the State of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said defendant C. H. Boedecker be and he is hereby decreed to have and recover judgment against the Scandinavian-

American Building Company in the sum of \$5.95, together with fifty cents expended for the filing of his claim of lien, and interest amount to 42 cents, without any attorney's fee, the same being waived, and for his costs and disbursements taxed herein in the sum of \$nil; and further that the said defendant C. H. Boedecker has a valid and subsisting labor lien upon the real property hereinabove described, to secure the payment of all sums for which he is hereby awarded a judgment.

IX.

That within one year prior to January 15, 1921, the defendant F. R. Schoen performed labor for and at the instance of the defendant Scandinavian-American Building Company upon its building situate upon the real property hereinabove described, of the reasonable value of \$198, and [358] likewise furnished material to and at the instance of the defendant Scandinavian-American Building Company to be used in the construction of its said building, of the reasonable value and amount of \$10.80, and thereafter and within ninety days after the cessation of the performance of said labor and the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of his claim of lien for said labor and material against said defendant Scandinavian-American Building Company and upon said real property, and thereafter and within the time limited by the statutes of the State of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that

by reason thereof said defendant F. R. Schoen be and he is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$208.80, together with interest amount to \$16.04, and for an attorney's fee of \$40, which is expressly decreed to be reasonable, and for his costs and disbursements taxed herein in the sum of \$10.00, and further that the said F. R. Schoen has a valid and subsisting labor lien upon the real property hereinabove described to secure the payment of said sum of \$198, and interest as above provided, and the attorney's fee of \$40, and his costs, and likewise has a valid and subsisting materialman's lien upon said property to secure the payment of the sum of \$10.80 and interest as hereinbefore provided.

X.

That within one year prior to January 15, 1921, the defendant Puget Sound Iron & Steel Works, at the instance of defendant E. E. Davis & Company, furnished to the defendant [359] Scandinavian-American Building Company material to be used in the construction of said defendant's building situate upon the real property hereinabove described, of the reasonable value and amount of \$495.90 and thereafter and within ninety days after the cessation of the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company, and said real property, and thereafter and within the time limited

by the statutes of the State of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said defendant Puget Sound Iron & Steel Works be and it is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$495.90, together with interest amount to \$44.63, and for an attorney's fee of \$100, which is expressly decreed to be reasonable, and for its costs and disbursements taxed herein in the sum of \$5.00; and further; that said defendant Puget Sound Iron & Steel Works has a valid and subsisting materialman's lien upon the real property hereinabove described to secure the payment of all sums for which it is hereby awarded a judgment.

XI.

That within one year prior to January 15, 1921, the defendant H. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency, furnished to and at the instance of the defendant Scandinavian-American Building Company, material to be used in the construction of said defendant's building situate upon [360] the real property hereinabove described, of the reasonable value and amount of \$708.54, and thereafter and within ninety days after the cessation of the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company, and said real property, and thereafter and within the time limited

by the statutes of the State of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said defendants H. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency, be and they are hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$708.54, together with interest amounting to \$52.55, and for an attorney's fee of \$125, which is expressly decreed to be reasonable, and for their costs and disbursements taxed herein in the sum of \$5.00; and further, that said defendant H. O. Matthews and Frank L. Johns have a valid and subsisting materialman's lien upon the real property hereinabove described to secure the payment of all sums for which they are hereby awarded a judgment.

XII.

That within one year prior to January 15, 1921, the defendant St. Paul & Tacoma Lumber Company furnished to and at the instance of the defendant Scandinavian-American Building Company, material to be used in the construction of said defendant's building situate upon the real property hereinabove described, of the reasonable value and amount of \$708.33, and thereafter and within ninety days after the cessation of the furnishing of said material, executed and caused to [361] be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Com-

pany, and said real property, and thereafter and within the time limited by the statutes of the State of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said defendant St. Paul & Tacoma Lumber Company be and it is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$708.33, together with interest amounting to \$54.65, and for an attorney's fee of \$125, which is expressly decreed to be reasonable, and for its costs and disbursements taxed herein in the sum of \$7.00; and further, that said defendant St. Paul & Tacoma Lumber Company has a valid and subsisting Materialman's lien upon the real property hereinabove described to secure the payment of all sums for which it is hereby awarded a judgment.

XIII.

That within one year prior to January 15, 1921, the defendant Savage-Scofield Company furnished to and at the instance of the defendant Scandinavian-American Building Company material to be used in the construction of said defendant's building situate upon the real property hereinabove described, of the reasonable value and amount of \$9342.25, and thereafter and within ninety days after the cessation of the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of the claim of lien against said defendant Scandinavian-American Building Company, and said real property, [362] and thereafter and with-

in the time limited by the statutes of the State of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said defendant Savage-Scofield Company be and it is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$9342.25, together with interest amounting to \$675.76, and for an attorney's fee of \$350, which is expressly decreed to be reasonable, and for its costs and disbursements taxed herein in the sum of \$10.00; and further, that said defendant Savage-Scofield Company has a valid and subsisting materialman's lien upon the real property hereinabove described to secure the payment of all sums for which it is hereby awarded a judgment.

XIV.

That within one year prior to January 15, 1921, the defendant Henry Mohr Hardware Company, Inc., furnished to and at the instance of the defendant Scandinavian-American Building Company material to be used in the construction of said defendant's building situate upon the real property hereinabove described, of the reasonable value and amount of \$36.84, and thereafter and within ninety days after the cessation of the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company and said real property, and thereafter and within the time limited by the statutes of the State of Washington, commenced suit in this court and cause to establish and

foreclose said lien, and that by reason thereof said defendant Henry Mohr Hardware [363] Company, Inc., be and it is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$36.84, together with interest amounting to \$286, and for an attorney's fee of \$25, which is expressly decreed to be reasonable, and for its costs and disbursements taxed herein in the sum of \$5.00; and further, that said defendant Henry Mohr Hardware Company, Inc., has a valid and subsisting materialman's lien upon the real property hereinabove described to secure the payment of all sums for which it is hereby awarded a judgment.

XV.

That within one year prior to January 15, 1921, the defendant Far West Clay Company furnished to and at the instance of the defendant Scandinavian-American Building Company, material to be used in the construction of said defendant's building situate upon the real property hereinabove described, of the reasonable value and amount of \$22,165.34, and thereafter and within ninety days after the cessation of the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien, against said defendant Scandinavian-American Building Company, and said real property, and thereafter and within the time limited by the statutes of the State of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof

said defendant Far West Clay Company be and it is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$22,165.34, together with interest amounting to \$1678.64, and for an attorney's fee of \$2500, which is expressly decreed to be reasonable, [364] and in accordance with said defendant's motion to amend its cross-complaint, which motion is hereby granted, and for its costs and disbursements taxed herein in the sum of \$31.20; and further, that said defendant Far West Clay Company has a valid and subsisting materialman's lien upon the real property hereinabove described to secure the payment of all sums for which it is hereby awarded a judgment.

XVI.

That within one year prior to January 15, 1921, the defendants S. J. Pritchard, C. H. Graves and Emma Graves, copartners doing business under the firm name and style of P. & G. Lumber Company, furnished to and at the instance of the defendant Scandinavian-American Building Company, material to be used in the construction of said defendant's building situate upon the real property hereinabove described, of the reasonable value and amount of \$40.80, and thereafter and within ninety days after the cessation of the furnishing of said material, executed and caused to be filed in the office of the auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company, and said real property, and thereafter and within the time

limited by the statutes of the state of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said defendants S. J. Pritchard, C. H. Graves and Emma Graves be and they are hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$40.80, together with interest amounting to \$3.47, and for an attorney's fee of \$25, which is [365] expressly decreed to be reasonable, and for their costs and disbursements taxed herein in the sum of \$5.00; and further, that said defendants S. J. Pritchard, C. H. Graves and Emma Graves have a valid and subsisting materialman's lien upon the real property hereinabove described to secure the payment of all sums for which they are hereby awarded a judgment.

XVII.

That within one year prior to January 15, 1921, the defendant Crane Company furnished at the instance of defendant Ben Olson Company to the defendant Scandinavian-American Building Company material to be used in the construction of said defendant's building situate upon the real property hereinabove described, of the reasonable value and amount of \$16,047.03, giving due notice of the commencement of such furnishing, and thereafter and within ninety days after the cessation of the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building

Company, and said real property, and thereafter and within the time limited by the statutes of the state of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said defendant Crane Company be and it is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$16,047.03, together with interest amounting to \$1238.29, and for an attorney's fee of \$2,000 which is expressly decreed to be reasonable, and for its costs and disbursements taxed herein in the sum of \$10 and [366] further, that said defendant Crane Company has a valid and subsisting materialman's lien upon the real property hereinabove described to secure the payment of all sums for which it is hereby awarded a judgment.

XVIII.

That within one year prior to January 15, 1921, the defendant Colby Star Manufacturing Company furnished to and at the instance of the defendant Scandinavian-American Building Company material to be used in the construction of said defendant's building situate upon the real property hereinabove described, of the reasonable value and amount of \$1770.12, and thereafter, and within ninety days after the cessation of the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company, and said real property, and thereafter and within

the time limited by the statutes of the state of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that upon the trial of said cause asked leave to amend its lien and cross-complaint herein to include the material aggregating the said value of \$1770.12, and that said motion is granted and said amendment allowed, and that by reason thereof said defendant Colby Star Manufacturing Company be and it is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$1770.12, together with interest amounting to \$136.59, and for attorney's fee of \$174, which is expressly decreed to be reasonable, and for its costs and disbursements taxed herein in the sum of \$10, and further, that said defendant Colby Star [367] Manufacturing Company has a valid and subsisting materialman's lien upon the real property hereinabove described to secure the payment of all sums for which it is hereby awarded a judgment.

XIX.

That within one year prior to January 15, 1921, the defendant Hunt & Mottet furnished to the defendant Scandinavian-American Building Company material to be used in the construction of said defendant's building situate upon the real property hereinabove described, of the reasonable value and amount of \$462.25, of which material to the value of \$111 was furnished at the instance of defendant E. E. Davis & Company, and thereafter and within ninety days after the cessation of the furnishing of said material, executed and caused to be

filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company and said real property, and thereafter and within the time limited by the statutes of the state of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said defendant Hunt & Mottet be and it is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$462.25, together with interest amounting to \$35.74, and for an attorney's fee of \$100, which is expressly decreed to be reasonable, and for its costs and disbursements taxed herein in the sum of \$5 and further, that said defendant Hunt & Mottet has a valid and subsisting materialman's lien upon the real property hereinabove described to secure the payment of all sums for which it is hereby awarded a judgment. [368]

That the defendant E. E. Davis & Company is primarily liable to the defendant Hunt & Mottet for the payment of \$111.75, and that upon the payment to the defendant Hunt & Mottet of the judgment hereby rendered in its favor by or on behalf of the defendant Scandinavian-American Building Company or by the application of the proceeds of the sale hereinafter ordered, the judgment hereinafter decreed in favor of the said defendant E. E. Davis & Company against Scandinavian-American Building Company shall be reduced and satisfied to the extent of said \$111.75.

XX.

That within one year prior to January 15, 1921, the complainant McClintic-Marshall Company furnished to and for the defendant Scandinavian-American Building Company, and at its instance, material to be used in the construction of said defendant's building situate upon the real property hereinabove described, of the reasonable value of \$176,632.37, and thereafter and within ninety days after the cessation of the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County a due and proper notice of its claim of lien against said defendant Scandinavian-American Building Company and said real property, and thereafter and within the time limited by the statutes of the state of Washington, commenced suit in this court and cause to establish and foreclose said lien. That the defendant Scandinavian-American Building Company was damaged by reason of defects in the sum of \$2000, but sustained no other damages on account of the acts or omissions of the complainant or which are chargeable against the complainant, and that by reason thereof, complainant [369] McClintic-Marshall Company be and it is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$174,632.37 and interest amounting to \$16,-180.46, and for an attorney's fee of \$12,500, which is expressly decreed to be reasonable, and for its costs and disbursements taxed herein in the sum of \$287.82; and further, that said complainant

McClintic-Marshall Company has a valid and subsisting materialman's lien upon the real property hereinabove described to secure the payment of all sums for which it is hereby awarded judgment.

XXI.

That within one year prior to January 15, 1921, the defendant J. D. Mullins, doing business as J. D. Mullins Bros., under a contract with the defendant Scandinavian-American Building Company for the furnishing and installing of certain electrical equipment and appliances, did furnish certain material to be used in the construction of said defendant's building upon the real property hereinabove described, and furnished labor in the installation thereof of the reasonable value and amount of \$319.08, and thereafter and within ninety days after the cessation of the performance of said labor and the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company and said real property, and thereafter and within the time limited by the statutes of the state of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said [370] defendant J. D. Mullins be and he is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$319.08, together with interest amounting to \$25.15, and for an attorney's fee of \$30, which is expressly

decreed to be reasonable, and for its costs and disbursements taxed herein in the sum of \$5 and further that said defendant J. D. Mullins has a valid and subsisting contractor's lien upon the real property hereinabove described to secure the payment of all sums for which it is hereby awarded a judgment.

XXII.

That the defendants Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company, do have and recover judgment against the Scandinavian-American Building Company in the sum of \$203.70, and interest amounting to \$16.22, and that of said amount of \$153.09, is the reasonable value of materials furnished and of labor furnished in the installation of said material by said defendants to the Scandinavian-American Building Company under a contract between the defendant Carl Gebbers and Fred S. Haines and the defendant Scandinavian-American Building Company for the furnishing and installing of certain electrical equipment and appliances upon the building of said defendant company situate upon the real property hereinabove described, and that within ninety days after the cessation of the performance of said labor and the furnishing of said material, said defendants Gebbers and Haines executed and caused to be filed in the office of the Auditor of Pierce County a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company and said real property and thereafter and [371]

within the time limited by the statutes of the state of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said defendant Carl Gebbers and Fred S. Haines be and they are hereby decreed to have a valid and subsisting contractor's lien upon the real property hereinabove described to secure the payment of said sum of \$153.09, together with interest amounting to \$12.19, and for an attorney's fee of \$40 which is expressly decreed to be reasonable and for their costs and disbursements taxed herein in the sum of \$5.00.

XXIII.

That the defendant H. C. Greene doing business under the firm name and style of H. C. Greene Iron Works do have and recover judgment against the Scandinavian-American Building Company in the sum of \$4656.88, together with interest thereon amounting to \$349.26, and for his costs and disbursements taxed at \$5.00. That of said amount \$109.35, is the reasonable value of material furnished by said defendant to and at the instance of the Scandinavian-American Building Company to be used in the construction of the building of said defendant upon the real property hereinabove described, over and above all just credits and offsets whatsoever. That of said amount of \$4656.88, \$750 is the fair and reasonable value of material furnished and of labor furnished in the installation thereof to the defendant Scandinavian-American Building Company to be used in the construction of said building under an agreement between the

said defendant H. C. Greene and the defendant Scandinavian-American Building Company for the furnishing and installing of a flag-pole, and that of said amount of \$4656.88, \$197.38 is the [372] reasonable value of material furnished and of labor furnished in the installation thereof, to the defendant Scandinavian-American Building Company to be used in the construction of said building upon said real property under an agreement between the defendant H. C. Greene and the defendant Scandinavian-American Building Company for the furnishing and installing of certain elevator cells and furnishings, and that within ninety days after the cessation of the performance of said labor and the furnishing of said material the defendant H. C. Greene executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of his claim of lien for said labor and material against said defendant Scandinavian-American Building Company and upon said real property, and thereafter and within the time limited by the statutes of the state of Washington commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said defendant H. C. Greene is hereby decreed to have a valid and subsisting materialman's lien upon the real property hereinabove described to secure the payment of \$109.35, with interest amounting to \$8.20, and its proportional part of \$150 which is hereby decreed to be a reasonable attorney's fee for the foreclosure of said defendant's lien, and is further decreed to have a valid and subsisting contractor's

lien upon the real property hereinabove described to secure the payment of said sums of \$750 and \$197.38, with interest amounting to \$71.05, and for their proportional part of the attorney's fee hereinbefore allowed, and also to secure the payment of the costs taxed herein. [373]

XXIV.

That within one year prior to January 15, 1921, the defendant E. E. Davis & Company under an agreement with the defendant Scandinavian-American Building Company for the erection and painting of the structural steel called for and required in said Scandinavian-American Building Company's building, and furnished material to be used in the construction of said defendant's building upon the real property hereinabove described, and furnished labor in the installation thereof of the reasonable value and amount of \$30,343.69, and thereafter and within ninety days after the cessation of the performance of said labor and the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company, and said real property, and thereafter and within the time limited by the statutes of the state of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof, said defendant E. E. Davis & Company be and it is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$30,343.69, together with inter-

est amounting to \$2341.52, and for an attorney's fee of \$3500, which is expressly decreed to be reasonable, and for its costs and disbursements taxed herein in the sum of \$5.00, and further that said defendant E. E. Davis & Company has a valid and subsisting contractor's lien upon the real property hereinabove described to secure the payment of all sums for which it is hereby awarded a judgment. And further that said defendant E. E. Davis & Company is primarily liable for the payment of the sums for which the defendant Puget Sound Iron & Steel Works is hereinbefore decreed to be entitled to a [374] lien, and is likewise primarily responsible for \$111.75 of the sum for which the defendant Hunt & Mottet is hereinbefore decreed to be entitled to a lien, and that upon the payment by the defendant Scandinavian-American Building Company to said defendants Puget Sound Iron & Steel Works and Hunt & Mottet of said amounts, or upon the payment of said amounts by the application of the proceeds of the sale hereinafter ordered, the judgment and decree hereby rendered in favor of the defendant E. E. Davis & Company and its lien therefor shall be correspondingly reduced.

XXV.

That within one year prior to January 15, 1921, the defendant Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name

and style of Tacoma Millwork Supply Company, procured and prepared certain material for delivery to the defendant Scandinavian-American Building Company under a contract with said defendant for the furnishing of material for said building, and that because of the breach of said contract by defendant Scandinavian-American Building Company the said defendants doing business as Tacoma Millwork Supply Company were damaged in the sum of \$52,799.33, and they are hereby decreed to have and recover judgment against the defendant Scandinavian-American Building Company in said sum of \$52,799.33, together with interest amounting to \$4,206.34, and for their costs and disbursements taxed in the sum of \$10, and that said defendants under said contract, furnished to and at the instance of the defendant Scandinavian-American Building [375] Company material of the reasonable value of \$4657.50 over and above all just credits and offsets whatsoever, to be used in the construction of said defendant Scandinavian-American Building Company's building situate upon the real property hereinabove described, and thereafter and within ninety days after the cessation of the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company and said real property, and thereafter and within the time limited by the statutes of the State of Washington, commenced suit in this court and cause to establish and foreclose

said lien, and that by reason thereof said defendants doing business as Tacoma Millwork Supply Company be and they are hereby decreed to have a valid and subsisting materialman's lien upon the real property hereinabove described to secure the payment of said sum of \$4657.50, together with an attorney's fee of \$500 which is hereby expressly decreed to be reasonable, and interest amounting to \$360.22, and that said defendants further performed certain labor for the defendant Scandinavian-American Building Company under a contract with said defendant Scandinavian-American Building Company for the installing and putting in place of the material to be furnished by them. That said labor was performed not upon the building situate upon the premises hereinabove described, but at the shops of the defendants doing business as Tacoma Millwork Supply Company and was of the reasonable value and amount of \$6,043, and that by reason thereof and because of the breach of said contract by the defendant Scandinavian-American Building Company, said [376] defendant doing business as Tacoma Millwork Supply Company be and they are hereby decreed to have and recover judgment from the defendant Scandinavian-American Building Company in the sum of \$6,043, together with interest amounting to \$466.32.

XXVI.

That heretofore and on or about the 27th day of February, 1920, the defendant Ben Olson Company entered into a contract with the defendant Scandinavian-American Building Company for the furnish-

ing and installing of certain plumbing, heating and ventilating supplies and equipment in the building situate upon the premises hereinbefore described. That the defendant Scandinavian-American Building Company breached said contract, to the defendant Ben Olson Company's damage in the sum of \$13,407.43, and Ben Olson Company is hereby decreed to have and recover judgment from the defendant Scandinavian-American Building Company in the sum of \$13,407.43, together with interest amounting to \$1043.60, and for its costs and disbursements taxed herein in the sum of \$10.00. That under and in accordance with said contract defendant Ben Olson Company furnished materials to be installed and used in the construction of the defendant Scandinavian-American Building Company's building aforesaid, and furnished labor in connection within the installation thereof, of the reasonable value and amount of \$9437.75, and thereafter and within ninety days after the cessation of the performance of said labor and the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant [377] Scandinavian-American Building Company and said real property, and thereafter and within the time limited by the statutes of the state of Washington, commenced suit in this court and cause to establish and foreclose said lien, but that by reason of the inclusion in said claim of lien of grossly excessive amounts, and by reason of said defendant's failure to pay the defendant Crane &

Company, whereby Crane & Company were required to and did file a claim of lien and establish the same in this suit, and because the value of the labor performed upon and material actually furnished to said defendant Scandinavian-American Building Company is less than the proper offsets and credits thereto, and for want of equity in said claim, it is decreed that defendant Ben Olson Company have no lien whatsoever upon the real property hereinabove described.

XXVII.

That within one year prior to January 15, 1921, the defendant Otis Elevator Company, under a contract with the defendant Scandinavian-American Building Company for the furnishing and installing of certain elevators, furnished material to the Scandinavian-American Building Company to be used in the construction of the building situate upon the real property hereinabove described, and furnished labor in connection with the installation thereof, of the reasonable value and amount of \$642.45, and thereafter and within ninety days after the cessation of the performance of said labor and the furnishing of said material, executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant [378] Scandinavian-American Building Company and said real property, and thereafter and within the time limited by the statutes of the state of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said

defendant Otis Elevator Company be and it is hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$642.45 together with interest amounting to \$49.68, and for an attorney's fee of \$125, which is expressly decreed to be reasonable, and for its costs and disbursements taxed herein in the sum of \$10.00; and further that said defendant Otis Elevator Company has a valid and subsisting contractor's lien upon the real property hereinabove described to secure the payment of all sums for which it is hereby awarded a judgment.

XXVIII.

That within one year prior to January 15, 1921, defendant Edward Miller Cornice & Roofing Company furnished to and at the instance of the defendant Scandinavian-American Building Company material to be used in the construction of said Building Company's building situate upon the real property hereinabove described, of the reasonable value of \$16.10, and furnished material and labor in the installation thereof to said defendant upon said building under a contract for installing certain flashing, of the reasonable value of \$43, and likewise within said period furnished material and labor in the installation thereof to said defendant Scandinavian-American Building Company, which labor was furnished upon and said material was furnished to be used in the construction of said Building Company's building situate [379] upon the real property hereinabove described, under a contract for the installing of certain roofing and sheet metal,

the reasonable value of which labor and material furnished, over and above all just credits and offsets, is the sum of \$270, and that by reason of the defendant Scandinavian-American Building Company's breach of its contract with defendant Edward Miller Cornice & Roofing Company, the latter has been damaged in the sum of \$1,600, and that by reason thereof Edward Miller Cornice & Roofing Company be decreed to have and recover judgment from the Scandinavian-American Building Company in the aggregate sum of \$1,929.10 with interest amounting to \$128.22, and for its costs and disbursements herein taxed in the sum of \$5.00, and that within ninety days after the cessation of the performance of said labor and the furnishing of said material, said defendant Edward Miller Cornice & Roofing Company executed and caused to be filed in the office of the Auditor of Pierce County, a due and proper notice of claim of lien against said defendant Scandinavian-American Building Company and said real property, and thereafter and within the time limited by the statutes of the state of Washington, commenced suit in this court and cause to establish and foreclose said lien, and that by reason thereof said defendant Edward Miller Cornice & Roofing Company be and it is hereby decreed to have a valid and subsisting materialman's lien upon the real property hereinabove described, to secure the payment of \$16.10, and a valid and subsisting contractor's lien upon said real property to secure the payment of \$313 together with an attorney's fee of \$175 which is hereby expressly

decreed to be reasonable, together with interest [380] amounting to \$24.05, and its costs taxed herein.

XXIX.

That on February 28, 1920, the Washington Brick, Lime & Sewer Pipe Company entered into a contract with the Scandinavian-American Building Company whereby it agreed to manufacture and deliver terra cotta for said building, according to special designs of the architect, for the sum of \$109,000; that pursuant to said contract said company fabricated and shipped to Tacoma, Washington, terra cotta of the value of \$58,657.50 and fabricated and stored at its plant terra cotta of the value of \$40,632.58, but no part thereof was used in said building, or delivered to the building company or used in said building, and title thereto was at all times vested in the manufacturer, and the Washington Brick, Lime & Sewer Pipe Company is not entitled to a lien for any part of the value thereof; that said Building Company paid on account of said contract \$20,000, but failed to further perform and carry out the same, and breached said contract, and by reason thereof said defendant has been damaged to the sum of \$72,511.13, and interest, and the defendant Washington Brick, Lime & Sewer Pipe Company be and it is hereby decreed to have and recover judgment against Scandinavian-American Building Company in the sum of \$72,511.13, and interest amounting to \$5,595.43, and for its costs and disbursements taxed herein in the sum of \$122.40.

XXX.

That the defendant Theodore Hedlund, doing business under the firm name and style of Atlas Paint Company failed to appear and offer any proof in support of his answer and cross-complaint, and that by reason thereof the same is hereby dismissed. [381]

XXXI.

That within one year prior to January 15, 1921, the defendant Morris Kleiner, doing business as Liberty Lumber & Fuel Company furnished material to the defendant Scandinavian-American Building Company of the reasonable value of \$128.14, and that by reason thereof is hereby decreed to have and recover judgment against the defendant Scandinavian-American Building Company for the sum of \$128.14, with interest amounting to \$9.89.

XXXII.

That each and all of the several judgments herein rendered in favor of the complainant and the several and respective lien claimants and cross-complainants shall bear interest at the rate of six per cent per annum from the date of the entry hereof until paid, and the several liens hereinbefore decreed in favor of said lien claimants or cross-complainants are likewise hereby decreed to secure the payment of such interest.

XXXIII.

That the waivers of lien made by the following defendants, to wit, the several copartners doing business under the name and style of Tacoma Mill-

work Supply Company, E. E. Davis & Company, Edward Miller Cornice & Roofing Company, Otis Elevator Company, H. C. Greene, Ben Olson Company, were induced by and made in reliance upon certain false material representations made by or on behalf of the defendant Scandinavian-American Building Company, which representations amounted to and constituted constructive fraud, and that by reason thereof said waivers are decreed to be of no force and effect, and that in addition thereto the defendant E. E. Davis & Company upon discovery of the falsity of said representations and upon the breach by the defendant Scandinavian-American [382] Building Company of its contract, promptly rescinded its contract with said defendant Scandinavian-American Building Company.

XXXIV.

That the defendant Scandinavian-American Bank of Tacoma and John P. Duke, as Supervisor of Banks of the State of Washington, assert a lien upon the real property hereinabove described, by reason of a certain mortgage executed October 27, 1915, by J. E. Chilberg and wife to the Penn Mutual Life Insurance Company; and thereafter and subsequent to January 17, 1921, and to the time when said John P. Duke as such Supervisor took charge of the property, assets and affairs of said Scandinavian-American Bank of Tacoma and of the liquidation of said bank, said mortgage was, by assignment in writing, assigned and transferred to the said John P. Duke as such Supervisor of

Banks in charge of the liquidation of the said defendant Scandinavian-American Bank of Tacoma. That subsequent to the making of said mortgage the said J. E. Chilberg and wife conveyed the premises covered thereby to the defendant Scandinavian-American Bank, subject to said mortgage, and thereafter defendant Scandinavian-American Bank conveyed said premises by deed, warranting the same to be free and clear of all encumbrances, to the defendant Scandinavian-American Building Company, and that by reason of said warranty the purported purchase and taking of an assignment of said mortgage by the defendant J. P. Duke as such Supervisor of Banks, operated as a payment of and to discharge said mortgage, and that by reason thereof and for want of equity, the cross-complaint of the defendant Scandinavian-American Bank of Tacoma and J. P. Duke as Supervisor of Banks of the State of Washington, in charge of the liquidation of the defendant Scandinavian-American Bank, based upon said mortgage is hereby dismissed. [383]

XXXV.

That the second cross-complaint of the defendants Scandinavian-American Bank of Tacoma and J. P. Duke, as Supervisor of Banks of the State of Washington, in charge of the liquidation of the Scandinavian-American Bank of Tacoma, seeking to establish a lien upon the real property hereinabove described, in the sum of \$350,000 besides interest, in the nature of a purchase money mortgage and claimed to arise out of the agreement attached to

the answer and cross-complaint of said defendants as Exhibit "X," be and the same is hereby dismissed for want of equity.

XXXVI.

That with respect to the third cross-bill of complaint of said defendants Scandinavian-American Bank of Tacoma and John P. Duke, as such Supervisor of Banks, for the foreclosure of the \$600,000 mortgage therein described, it is expressly decreed that G. Wallace Simpson was without right, power or authority to assign or transfer the mortgage in said cross-bill referred to, to the defendant Scandinavian-American Bank of Tacoma, and that said assignment was an attempted pledge and security for the payment of a previously created and then existing indebtedness and was made without any notice to or the knowledge of the several parties herein decreed to have liens, and long subsequent to the commencement of the furnishing of labor or material by the complainant and other lien claimants, and was in contravention of the Constitution of the State of Washington, and such assignment rendered said mortgage void as against the several parties herein decreed judgments against the Scandinavian-American Building Company, and that Scandinavian-American Building Company was the agent of the defendant Scandinavian-American Bank of Tacoma for [384] the purpose of providing the said bank with suitable banking quarters, and was at all times subject to the control of and controlled by said bank, and that by reason thereof and because of the trust relation thereby arising, the defendant

Scandinavian-American Bank of Tacoma and the defendant John P. Duke as Supervisor of Banks of the State of Washington in charge of the liquidation of said Scandinavian-American Bank of Tacoma, could not obtain any advantage by reason of the assignment of said \$600,000 mortgage to said bank, and therefore and for want of equity in said cross-complainants' said third cross-bill of complaint, is hereby dismissed.

XXXVII.

That defendant J. P. Duke as Supervisor of Banks for the State of Washington, is entitled to a judgment against defendant Scandinavian-American Building Company on account of the moneys paid in procuring the assignment of the mortgage described in his first cross-bill of complaint and referred to in paragraph XXXIV hereof, which judgment, however, shall be subordinate and inferior in its lien and rank to all other judgments herein or hereby decreed against said Scandinavian-American Building Company, and that said defendant J. P. Duke as such Supervisor of Banks, is therefore hereby decreed to have and recover judgment against the Scandinavian-American Building Company in the sum of \$72,366.35, and interest amounting to \$4,293.73, but that said judgment is hereby expressly decreed to be inferior and subordinate in lien and rank to each and every other judgment hereby decreed against defendant Scandinavian-American Building Company.

XXXVIII.

That from time to time during the year 1920, and

prior to January 15, 1921, defendant Scandinavian-American Bank of [385] Tacoma, advanced to and for the benefit of defendant Scandinavian-American Building Company, various amounts aggregating \$232,094.42, no part of which has been repaid, and that on account thereof, J. P. Duke, as Supervisor of Banks for the State of Washington, be and he is hereby decreed to have and recover judgment against said Scandinavian-American Building Company in the sum of \$232,094.42, and interest amounting to \$19,136.62, and for his costs and disbursements to be taxed herein in the sum of \$——.

XXXIX.

That defendant Forbes P. Haskell, as Receiver of Scandinavian-American Building Company, at the time of his appointment as such Receiver, waived any and all right to personal compensation as such Receiver, but that a reasonable sum to be allowed to him as part of the expenses of said receivership and for the services of his attorney, F. D. Oakley, is the sum of \$10,000.

XL.

That there is now due and owing from the defendant Scandinavian-American Building Company on account of the several sums hereinbefore decreed to be liens upon its property, an aggregate of \$268,157.37 principal and \$24,635 as attorney's fees, and interest amount to \$23,305.65, and costs of \$479.32. That said defendant Scandinavian-American Building Company is hereby required, within ten days after the entry of this decree, to pay or cause to be

paid to the Clerk of this court, subject to the further order of this Court, the above sums, aggregating \$316,577.34, together with interest thereon at the rate of six per cent per annum from the date hereof until paid, and upon payment of said amount and upon making and filing in this court an undertaking to pay such sums as the said defendant [386] Scandinavian-American Building Company may be hereafter directed to pay on account of court costs or further expenses in this cause accruing, the Scandinavian-American Building Company may apply to this Court to be relieved from the operation of the decree of foreclosure and sale herein contained, with respect to its property, and upon such payment all interest upon said amounts and the several liens shall cease, and the said defendant shall be entitled to the relief of this decree to that extent; any undertaking which may be given by said defendant for the purposes aforesaid shall be secured by a lien upon all the property of said defendant within this district and hereinbefore described, which lien in such case is hereby charged upon said property and the said defendant shall from time to time in such event execute, acknowledge, deliver and record such assignment or assignments as this Court shall direct to give effect to said lien.

XLI.

That the several liens hereinbefore decreed to be established and each and all of them be and they are hereby foreclosed, and the defendants Scandinavian-American Building Company, Forbes P.

Haskell, as Receiver of Scandinavian-American Building Company, Scandinavian-American Bank of Tacoma, Washington, John P. Duke, as State Supervisor of Banks in charge of the liquidation of said Scandinavian-American Bank of Tacoma, and Forbes P. Haskell, as Special Deputy Supervisor of Banks in active charge of the liquidation of said Scandinavian-American Bank of Tacoma, G. Wallace Simpson, Frederick Weber, Washington Brick Lime & Sewer Pipe Company, United States Machine & Engineering Company, Tacoma Shipbuilding Company, Ben Olson Company, Morris Kleiner, doing business as Liberty Lumber & Fuel Company, J. A. Soderberg, doing business as West Coast Monumental Company, Theodore Hedlund, doing business at Atlas Paint Company, F. W. Madson, Sherman Wells, Carl J. [387] Gerringer, George Gerringer, A. W. Aufang, W. E. Morris, Gustaf Jonasson, and all persons claiming or hereafter to claim by, through or under them or any of them including Seattle Hardware Company, a corporation, be and they are hereby foreclosed of all right, estate and interest in and to the real property hereinabove described and hereinafter ordered sold, except such equity of redemption as they may have by law, and that unless the defendant Scandinavian-American Building Company shall be relieved from the operation of this decree as hereinbefore provided, a Special Master Commissioner hereinafter appointed is hereby authorized and directed to sell at public auction to the highest and best bidder, for cash, all and singular the following described

property situate in the County of Pierce, State of Washington, and within the Western District of Washington, Southern Division, against which the foregoing several liens are established, to wit:

Lots ten (10), eleven (11) and twelve (12) in Block ten hundred three (1003), as the same are shown and designated upon a certain plat entitled, "Map of New Tacoma, W. T.," which was filed for record in the office of the Auditor of Pierce County, Washington Territory, February 3, 1875.

together with all the hereditaments and appurtenances thereto belonging, and the rents, issues and profits therefrom arising or in any manner appertaining.

XLII.

All of the property directed by this decree to be sold shall be sold without valuation, appraisement, extension or stay of execution, but subject to the right of redemption allowed by the laws of Washington by R. F. Laffoon, of Tacoma, who is hereby appointed Special Master Commissioner for that purpose, at public auction to the highest bidder for cash, at the principal entrance of the Court House of Pierce [388] County, Washington, in the city of Tacoma, Pierce County, Washington, at such time as this Court may fix by order hereinafter entered herein.

The Special Master Commissioner shall give notice of such sale by publication once a week for four successive weeks, prior to such sale, in a newspaper printed and regularly issued, and having a

general circulation in the County of Pierce and State of Washington, the Court hereby finding and directing that such notice so published shall be sufficient for the sale of said property, providing each notice shall contain a description of the property to be sold, a statement of the time and place of sale and a reference to this decree for a statement of the terms and conditions of such sale; such publication shall be begun forthwith upon the entry of the order fixing the date of sale.

The Special Master Commissioner may in his discretion, adjourn the sale from week to week for such reasonable time as may seem to him good and sufficient, by announcing such adjournment and the time and place to which such sale shall be adjourned, at the time appointed for such sale, and may in like manner from time to time adjourn such sale without further advertisement.

Any party to this cause may bid in and purchase said property at said sale and may hold the property so purchased in his, its or their own right, free from all interest of the parties hereto whatsoever, except the equity of redemption provided by law. [389]

The Special Master Commissioner shall receive no bid from any one offering to bid, who, prior to said sale, shall not have deposited with him or delivered to him as a pledge that such bidder will make good his bid in the event of its acceptance, in money or certified check therefor, on some bank or trust company having a paid up capital and surplus of not less than \$100,000, the sum of \$10,000.

The deposit made by any unsuccessful bidder shall be returned to such unsuccessful bidder when the property shall be struck off. The deposit of any successful bidder shall be applied on account of the purchase price of the property. In case any bidder shall fail to make good his bid upon its acceptance by said Special Master Commissioner, or shall, after such acceptance fail to comply with any order of this Court relating to the payment thereof or to the consummation of the purchase, then the money or check theretofore deposited by such purchaser shall be forfeited as a penalty for such failure, and shall be applied to the expenses of a resale and toward making good any deficiency or loss in case the property purchased by him shall be sold at a less price of such resale, or shall be applied to the payment of any deficiency remaining unpaid on account of the several liens against the property ordered sold, in the event that any resale had under the terms of this decree shall not pay the full amount herein found to be due upon such liens, together with all the costs and expenses of this proceeding.

If such sale shall not be confirmed by the court such deposit shall be returned to the bidder. If the sale is confirmed there shall be paid in cash out of the deposit made by the bidder, such sums as the Court may at the time of the confirmation of said sale direct, in order to pay the [390] costs and expenses of foreclosure and sale, all sums so paid, to apply upon the purchase price of the property sold and the remainder of the purchase price

shall be paid in cash or partly in cash and partly by the application of the purchaser's judgment thereto, as provided in the next succeeding paragraph. Any portion of said deposit not required for the payments herein specified shall apply upon the balance of the purchase price. The purchaser or purchasers, his or their successors as assigns, shall not be bound to inquire into or see to the application of the purchase money.

XLIII.

That the property herein decreed to be sold cannot be sold in parcels without injury to the interests of the parties, and all of said property is hereby directed to be offered for sale as an entirety, subject to the confirmation of such sale by this court.

XLIV.

The fund arising from the sale of the premises hereinbefore directed to be sold shall be applied as follows, and in the following order, to wit:

(a) To the payment of the expenses of such sale, including the fees and expenses of the Special Master Commissioner appointed to conduct said sale, which fees are hereby fixed at the sum of \$500.00, and to the payment of the further costs of this suit including Clerk's fees and commissions.

(b) To the payment of the attorney's fees hereby allowed the Receiver, and to the payment of all Receiver's certificates heretofore or hereafter, and pending the confirmation of sale, issued by Forbes P. Haskell as Receiver of Scandinavian-American Building Company under the orders and

direction of this [391] court as heretofore made and entered or which may be hereafter made and entered, together with interest accrued on such certificates as provided therein. The total of the principal amount of such certificates now issued is hereby expressly found and decreed to be \$17,361.28.

(c) To the payment and discharge of the several liens, including principal, interest, attorney's fees and costs in the following rank and order of priority: (1) all labor liens; (2) all materialmen's liens; (3) all contractor's liens; provided that if the proceeds shall be insufficient to pay in full all of the liens in any one class, then such moneys available for the payment of the liens of that class shall be apportioned among the several lien claims in the ratio that the aggregate of each lien claim,—that is to say, the total of principal, interest, attorney's fees and costs,—bears to the total of all the lien claims in said class.

(d) To the equal and ratable payment and discharge of the several judgments hereby decreed against the defendant Scandinavian-American Building Company, which are unsecured by specific liens upon the premises ordered sold, but without priority whether or principal, interest or costs, as between said several judgments, save and except that the judgment hereinbefore rendered in favor of J. P. Duke as Supervisor of Banks for the State of Washington, for the sum of \$72,366.35 and \$4,293.73 interest, shall not share in the distribution of said proceeds until all other general and

unsecured judgments have been fully paid and satisfied.

(e) Any surplus remaining shall be paid to the Clerk of this court to be held by him subject to the further order [392] of this court.

XLV.

The Court reserves for consideration, upon the coming in of the Special Master Commissioner's report of sale, all matters relating to the adequacy of the bid and reserves the right as a condition of the acceptance of any bid, upon application for the confirmation of any sale, to impose such terms upon the purchaser as the Court may see fit, and may reject any bid and may retake and resell the property purchased if the Court shall deem such bid inadequate; and upon the failure of any bidder, the conditional acceptance of whose bid by the Special Master Commissioner shall have been confirmed and ratified by this Court, to comply with any order of this Court regarding the payment of the purchase price, within thirty days after service of notice of the entry of such order, all sums paid by the defaulting purchaser shall be forfeited as a penalty for such noncompliance as hereinbefore provided, and the Court reserves full jurisdiction to enter any order, judgment or decree necessary to enforce the provisions of this decree against any such defaulting purchaser or purchasers.

XLVI.

The purchaser or purchasers, his or their successors or assigns, shall have the right to enter his or their appearance in this court, and he or they,

or any of the parties to this suit, shall have the right to contest any claim, demand or allowance existing at the time of the sale and then undetermined, and any claim or demand which may hereafter arise or be presented, which would be payable by such purchaser, purchasers, or their successors or assigns, or which would be payable out of the purchase price, and he or they may appeal from any decision relating to any such claim, demand or allowance. [393]

XLVII.

Upon confirmation of the sale and payment in full of the purchase price, and upon compliance with all the terms of the sale, including the execution of all undertakings and agreements, and the giving of any security which may be required by this Court in pursuance of the terms of this decree, the Special Master Commissioner making the sale shall make, execute and deliver to the purchaser or purchasers, his or their successors or assigns, a certificate of purchase describing the property sold and the amount bid therefor, and the time when said purchaser shall be entitled to a deed therefor, and upon the expiration of the period of one (1) year from the date of sale allowed by the laws of Washington for the redemption of said property from the sale thereof, said Special Master Commissioner, in event said property shall not have been redeemed, as provided by the laws of the State of Washington, make, execute, acknowledge and deliver to said purchaser or purchasers, a deed of conveyance of said property so sold.

The person, corporation, association or committee to whom said Special Master Commissioner's certificate of purchase, or deed, shall be delivered, shall be let into the possession of the said property and all of the parties to this cause, and all persons and corporations claiming by, through or under them, or any of them, are ordered and required to surrender and deliver up possession of the said property to such person, or persons, or such corporation, association or committee, to whom, or to which, said Special Master Commissioner's certificate of Purchase or deed shall be delivered, or to his, their, or its, successors or assigns. [394]

The Court reserves exclusive power and jurisdiction to deliver to the purchaser or purchasers title to and possession of the property hereinbefore directed to be sold, and to determine any and all controversies as to the character, extent and validity of the possession of such purchaser, or purchasers, acquired through the execution of this decree, or by or under the terms of this decree.

XLVIII.

The Court reserves for future determination all questions relating to the rendering of any decree for any balance that may be found to be due to any of the lien claimants, over and above the proceeds of the sale herein directed, and all matters of equity not herein expressly adjudged, including any and all conflicting claims of title or equitable claims or rights arising between the parties to this cause or between any purchasers under this decree.

XLVIX.

It is further ORDERED, ADJUDGED AND DECREED that any party to this cause, or any person or persons who may become purchasers under this decree, may apply for further order and direction touching the matters and issues undisposed of by this decree, or relating to costs, allowances and disposal of proceeds of sale, and this Court retains full jurisdiction of this cause respecting any of the matters and things regarding which this Court has not made final and complete disposition, and like full jurisdiction of any and all matters properly arising as collateral or incidental to such matters. [395]

L.

That other than herein expressly decreed and except as jurisdiction may have been hereinbefore expressly reserved, all further, additional or different relief prayed for by any of the parties hereto be and it is hereby denied.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 2, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [396]

Order Correcting Decree.

This cause coming on to be heard upon the complainant's motion to amend and correct the decree heretofore entered in this cause, said motion having

been duly noticed for hearing on this day and the Court being duly advised in the premises,—

DOTH NOW ORDER that said motion be and the same is hereby in all respects granted; and DOTH FURTHER ORDER that paragraph XL of said decree in this cause be amended by interlineation so that the first sentence of said paragraph shall read as follows:

“That there is now due and owing from the defendant Scandinavian-American Building Company on account of the several sums hereinbefore decreed to be liens upon its property an aggregate of \$268,157.37, principal, and \$24,635 as attorneys’ fees, and interest amounting to \$23,305.65, and costs of \$479.32, besides the fees allowed for the services of the receiver’s attorney, and the outstanding receiver’s certificates.”

And so that the figures “\$316,565.55” in line 10 of said paragraph shall read “\$316,577.34.”

Done in open court this 30th day of June, 1922.

EDWARD E. CUSHMAN,
Judge. [397]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 30, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [398]

Exceptions of Tacoma Millwork Supply Company to Decree.

The defendants, R. T. Davis, Jr., and others doing business under the firm name and style of Tacoma Millwork Supply Company, a copartnership, through their attorneys, Flick & Paul, do hereby except to the judgment and decree entered in the foregoing cause on the 2d day of May, 1922, and to each and every part thereof.

I.

They except to any portions of said decree granting priority to any of the other material lien claimants above the status given to the entire material furnished by Tacoma Millwork Supply Company, whether delivered or not on the building site.

II.

The Millwork Company further excepts to said decree and all those parts thereof which grant the Tacoma Millwork Supply Company a lien for only that portion of material actually delivered upon the premises and for only that work actually done upon the premises and which deny lien relief for that material actually manufactured, tendered to or stored in behalf of said building company.

III.

Said Millwork Company further excepts to said decree and each and every part thereof for its failure to give to said claimant a lien for all of the material specified in its schedules attached to its complaint. Said Millwork Company further excepts to said decree in that it does not recognize the

right of lien on the part of the Millwork Company for all of its materials which were specifically fashioned as per architectural design, in view of the fact that tender of said materials was made and at the instance and under the direction or by the consent of the owners on the ground, said materials were stored in warehouses. [399]

IV.

Said defendant Millwork Company further excepts to the proposed sale of said building without the inclusion, as part of the assets of said building, of the materials described in the schedules attached to this claimant's complaint, and its *pro rata* participation, in that manner, in the proceeds of said sale.

V.

The said claimant excepts to each and every portion of paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, as granting to said parties materialmen's liens for materials furnished upon the premises as against the refusal to grant, as set forth in paragraph 25, this claimant material liens in the amount of \$57,005.67, on the theory that though there was constructive delivery, there was not actual delivery upon the premises, for the reason that the said finding is against the facts adduced and the law involved and further excepts to findings in said paragraph 25 granting only a personal judgment against said Building Company for the amount of \$57,005.67, instead of a lien for the amount upon said premises and for the same reason excepts to the finding and judgment in said paragraph relat-

ing to the claiming of a lien in the amount of \$4,657.50, and interest, as lienable material in the face of the tender and delivery into warehouses of all of said material amounting, with interest, to a total of \$62,735.15, and also excepts to the finding of said paragraph granting only personal judgment in the amount of \$4,657.50, instead of granting judgment for said amount by way of a lien upon said premises, and further excepts to a judgment in damages for said amounts instead of a judgment and decree of lien for said amounts.

VI.

Further excepts to paragraphs 16, 17, 18, 19, 21, for the reason that the Court, in said paragraphs, grants liens for materials delivered on the premises as against materials delivered in warehouses at the direction of the owner, which was done by this [400] claimant.

VII.

Further excepts to any finding in the said decree granting to the Scandinavian-American Bank a right prior to this lien claimant by reason of any advances, so-called, under the \$600,000.00 mortgage as claimed by said Bank, or by reason of any advances by way of payment of the Penn-Mutual Mortgage in the amount of \$70,000.00 for the reason that said claims are subordinate, under the facts, to all of the claims of this claimant, whether allowed as a lien or not, in that the said allowances to said bank are in the face of certain representations made which estop said bank from claiming any rights prior to this lien claimant, and particularly

excepts to the granting of a judgment, general in its nature, to said bank for advances made upon said \$600,000.00 mortgage, as alleged.

VIII.

This claimant further excepts to said decree in that it would not grant and does not grant to this claimant a lien in the full amount claimed by it in the complaint and the schedules thereto attached, and further excepts to the failure of the Court to grant said claimant as and by way of attorneys' fees a sum proportionate to the sums allowed other claimants herein, and specifically excepts to the finding implied by this decree that a delivery upon the premises or use of the material actually in the building is required, under the statutes of the State of Washington in the premises.

IX.

This claimant further excepts to each and all of the findings portrayed in the memorandum decision signed by His Honor Judge Cushman, in this cause, on the — day of —, 1922, and repeats by reference thereto all of the exceptions as against said findings, filed in this cause as though herein again specifically set forth. [401]

X.

This claimant further excepts to any portion of said judgment and decree which grants to any materialman, or to any claim other than the preferred class of laborers' rights superior and prior to these appellants as materialmen, and which grants any rights superior or prior to the rights of these ap-

pellants in their labor claim as recited in the schedules attached to said appellants' claim.

XI.

This claimant further and finally excepts to the refusal of the Court to enter an order declaring that all of the material recited in the schedules attached to plaintiff's complaint was and is an integral part of the premises or property herein sought to be liened, for the reason that said appellant tendered all of said material within the time limited by their contract, that it was specially designed and worthless upon their hands, and that it was stored with the consent of the owner and retained in the storehouse away from the property only because of the owner's convenience and the safety of the material.

FLICK & PAUL,

Attorneys for the Defendant Tacoma Millwork Supply Company.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 3, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [402]

Petition for Appeal of Forbes P. Haskell, Jr.

Forbes P. Haskell, Jr., as Receiver of the Scandinavian-American Building Company, a corporation, and duly and legally appointed, qualified and acting as such in the above-entitled action, feeling himself aggrieved by the decree made and entered in the above-entitled cause on the 2d day of May,

1922, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reason specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

GUY E. KELLY and

THOMAS MacMAHON,

Attorneys for Forbes P. Haskell, Jr., as Receiver
of the Scandinavian-American Building Com-
pany.

The foregoing petition for appeal is hereby allowed this 21st day of July, 1922, upon giving bond conditioned as required by law in the sum of \$500.00.

EDWARD E. CUSHMAN.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 21, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [403]

Bond on Appeal of Forbes P. Haskell, Jr.

KNOW ALL MEN BY THESE PRESENTS:
That I, Forbes P. Haskell, as Receiver of the Scan-

dinavian-American Building Company, a corporation, as principal, and the National Surety Company of New York, a corporation, organized under the laws of the State of New York, and authorized to transact the business of Surety in the State of Washington, as Surety, are held and firmly bound unto McClintic-Marshall Company, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tenant, Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Co., G. Wallace Simpson, Savage-Scofield Company, a corporation, Puget Sound Iron & Steel Works, a corporation, E. E. Davis & Company, a corporation, St. Paul & Tacoma Lumber Company, a corporation, Far West Clay Company, a corporation, Henry Mohr Hardware Company, Inc., a corporation, Hunt & Mottet, a corporation, Edward Miller Cornice & Roofing Company, a corporation, Washington Brick, Lime & Sewer Pipe Company, a corporation, Otis Elevator Company, a corporation, United States Machine & Engineering Co., a corporation, Crane Company, a corporation, Ben Olson Co., a corporation, H. C. Greene, doing business as H. C. Greene Iron Works, Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company, S. O. Matthews and Frank L. Johns, copartners [404] doing business under the firm name and style of City Lumber Agency, J. D. Mullins doing business

as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, copartners doing business as P & G. Lumber Company, Morris Kleiner, doing business as Liberty Lumber & Fuel Company, J. A. Soderberg, doing business as West Coast Monumental Co., Theodore Hedlund, doing business as Atlas Paint Co., F. W. Madsen, Gustaf Jonasson, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed. Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. F. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, E. A. Fetterly, Thomas S. Short, and Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal, Sherman Wells, Carl J. Geringer, George Geringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey, Seattle Hardware Company, a corporation, Frederick Webber and O. S. Larson, and W. E. Morris, Colby Star Manufacturing Company, a corporation, Tacoma Shipbuilding Company, a corporation, J. P. Duke as Supervisor of Banks of the State of Washington, and as successor in office to the defendant Claude P. Hay, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, Jr., as Special Deputy Supervisor of Banks of the State of Washington,

and Scandinavian-American Bank of Tacoma, a corporation, the defendants above named, in the full and just sum of Five Hundred Dollars (\$500.00); to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and [405] successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of July, 1922.

THE CONDITION of this obligation is such, that whereas, in the above-named action there was signed and entered in the District Court of the United States, for the Western District of Washington, Southern Division, on the 2d day of May, 1922, a judgment and decree, in favor of the complainant above named and others adjudging their respective rights and granting to said complainant and others of the cross-complainants and defendants herein mentioned, rights superior to and prior to the claimed and alleged rights of appellant herein, and whereas the said principal herein has obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree and a citation directed to the said complainant and the other defendants and cross-complainants herein named admonishing them and each of them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in the State of California, within thirty days from July 31, 1922.

Now, if the said Forbes P. Haskell, Jr., as Receiver of the Scandinavian-American Building Company, a corporation, shall prosecute his appeal to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

FORBES P. HASKELL, Jr.,
Receiver of the Scandinavian-American Building
Company, a Corporation. [406]

NATIONAL SURETY COMPANY OF
NEW YORK.

By FREDERIC D. METZGER,
Resident Vice-President.

By W. B. GILHAM,
Resident Assistant Secretary.

Approved this 31st day of July, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 31, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [407]

Assignment of Errors of Forbes P. Haskell, Jr.

Forbes P. Haskell, Jr., as Receiver of the Scandinavian-American Building Company, a corporation, respectfully submits and makes the following assignment of errors in the above-entitled cause upon which he relies as supporting his appeal from the judgment and decree made and entered

in the above-entitled cause on the 2d day of May, 1922, and under which assignment of errors said appellant seeks reversal of the decision, judgment and decree of said Trial Court.

I.

The Court erred in holding that the McClintic-Marshall Company, a corporation, complainant herein, has a valid and subsisting materialmen's lien upon the real estate, premises, or any part thereof described in paragraph three of said decree, for the reason that the arbitration agreement contained in the contract between the complainant and the Scandinavian-American Building Company was not complied with by the complainant and its failure and refusal to arbitrate matters in dispute under the contract constituted a bar to the prosecution of this action to maintain and foreclose a lien claim.

II.

The Court erred in not holding that because of the arbitration agreement contained in the contract between McClintic-Marshall Company, and Scandinavian-American Building Company, that the complainant had waived its right of lien under the Statutes of the State of Washington, in such cases made and provided, until and unless it had substantially complied with the arbitration agreement which was a binding and valid agreement under both the [408] laws of the State of Washington, and of the State of Pennsylvania, the domicile of complainant corporation.

III.

The Court erred in refusing to hold that because of the arbitration agreement referred to in the two preceding assignments of error the Court is without jurisdiction to hear and determine the merits of said claim and for that reason had no jurisdiction to hear and determine the subject matters involved in this litigation, and has no jurisdiction of the parties.

IV.

The Court erred in permitting the introduction of testimony in proof of the complainant's complaint and lien claim for the reason that the contract between complainant and the Scandinavian-American Building Company upon which complainant bases its right of recovery, provides that any controversies arising out of the contract should be submitted to arbitration, which was not done and said failure and refusal so to do constitutes a bar to the prosecution of said lien claim.

V.

The Court erred in not dismissing the bill of complaint.

VI.

The Court erred in holding that the Puget Sound Iron and Steel Works, a corporation, has a valid lien as provided in paragraph ten of said decree, for the reason that the said corporation never filed any complaint or cross-complaint, or other pleadings in this action, seeking a foreclosure of its alleged lien, [409] and under the laws of the State of Washington, such action must be insti-

tuted within eight months from the filing of its said lien claim.

VII.

The Court erred in decreeing a foreclosure of liens in this action because that when the Court appointed a receiver for the Scandinavian-American Building Company in the above-entitled action, the Court deprived itself of the power to foreclose the lien claim and had only the power and right to allow or reject claims in the receivership proceeding and to determine the rank and priority of each claim allowed.

VIII.

The Court erred in holding lien claimants entitled to interest and attorney's fees for the reason set forth in assignment of error No. VII and for the further reason that in a receivership proceeding interest and attorney's fees are not allowable as attempted to be allowed in the decree entered herein.

IX.

The Court erred in holding in paragraph XXXIII of the decree entered herein that the Tacoma Millworks Supply Company, E. E. Davis & Company, Edward Miller Cornice & Roofing Company, Otis Elevator Company, H. C. Greene, Washington Brick, Lime & Sewer Pipe Company, Ben Olson & Company, were induced to enter into their contracts containing waivers of lien by reason of false and fraudulent representations made on behalf of the Scandinavian-American Building Company, and in decreeing [410] that by reason thereof that

the said waivers be of no force and effect and in allowing any of said claimants in this paragraph XXXIII mentioned, or Crane Company, a lien claim or claims in this action, for the reason that the said lien waiver clauses are valid and binding obligations.

WHEREFORE, the above-named Receiver prays that said decree may be reversed and that said Court be directed to dismiss said action, or to enter such decree as the Court may direct as equitable herein.

GUY E. KELLY,
THOMAS MacMAHON,
Attorneys for Forbes P. Haskell, Jr. as Such Receiver.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 21, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [411]

Citation on Appeal of Forbes P. Haskell, Jr.

UNITED STATES OF AMERICA to McClintic-Marshall Company, a Corporation, Ann Davis and R. T. Davis, Jr., as Executors of the Estate of R. T. Davis, Deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, Copartners Doing Business Under the Name and Style of Tacoma Millwork Supply Co., G.

Wallace Simpson, Savage-Scofield Company, a Corporation, Puget Sount Iron & Steel Works, a Corporation, E. E. Davis & Company, a Corporation, St. Paul & Tacoma Lumber Co., a Corporation, Far West Clay Company, a Corporation, Henry Mohr Hardware Company, Inc., a Corporation, Hunt & Mottet, a Corporation, Edward Miller Cornice & Roofing Company, a Corporation, Washington Brick, Lime & Sewer Pipe Company, a Corporation, Otis Elevator Company, a Corporation, United States Machine & Engineering Co., a Corporation, Crane Company, a Corporation, Ben Olson Co., a Corporation, H. C. Greene, Doing Business as H. C. Greene Iron Works, Carl Gebbers and Fred S. Haines, Copartners Doing Business Under the Firm Name and Style of Ajax Electric Company, S. O. Matthews and Frank L. Johns, Copartners Doing Business Under the Firm Name and Style of City Lumber Agency, J. D. Mullins, Doing Business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, Copartners Doing Business as P. & G. Lumber Company, Morris Kleiner, Doing Business as Liberty Lumber & Fuel Company, J. A. Soderberg, Doing Business as West Coast Monumental Co., Theodore Hedlund, Doing Business as Atlas Paint Co., F. W. Madsen, Gustaf Jonasson, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom,

Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, and Robert M. Davis and Frank C. Neal, Copartners Doing Business Under the Firm Name and Style of Davis & Neal, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey, and W. E. Morris, Colby Star Manufacturing Company, a Corporation, Tacoma Shipbuilding Company, a Corporation, Scandinavian-American Building Company, a Corporation, Scandinavian-American Bank of Tacoma, a Corporation, P. Claude Hay, as State Bank Commissioner for the State of Washington, and John P. Duke, His [412] Successor in Office, as Supervisor of Banks of the State of Washington, Forbes P. Haskell, as Deputy State Bank Commissioner for the State of Washington, Seattle Hardware Company, a Corporation, Frederick Webber, and O. S. Larson, GREETINGS:

YOU ARE HEREBY NOTIFIED that in a certain case in equity in the United States District Court in and for the Western District of Washington, Southern Division, wherein McClintic-Marshall Company, a Corporation, is complainant, and

Forbes P. Haskell, as Receiver of Scandinavian-American Building Company, a Corporation, et al., are defendants and cross-complainants, said case being numbered 117-E, in which case a Decree was entered and rendered by the said Court on the 2d day of May, 1922, an appeal has been allowed Forbes P. Haskell, as Receiver of Scandinavian-American Building Company, a corporation, defendant therein, to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the date of this citation and there show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS, the Honorable E. E. CUSHMAN, Judge of the United States District Court for the Western District of Washington, this 31st day of July, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 31, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [413]

**Notice of Lodgment of Statement of Evidence in
Behalf of Forbes P. Haskell.**

To _____,

Attorneys for _____.

You are hereby notified that on the 29th day of June, 1922, F. P. Haskell, as Receiver of the Scandinavian-American Building Company, one of the defendants above named, lodged with the Clerk of the above-entitled court his proposed statement of the testimony as provided in Equity Rule 75 (b), to be used by him on his appeal to the Circuit Court of Appeals for the Ninth Circuit; and take notice further that on the Friday, the 21st day of July, 1922, at 10 o'clock A. M., or as soon thereafter as the matter can be heard, the undersigned will apply to said Court to approve said statement.

KELLEY & MacMAHON,

Attorneys for F. P. Haskell, Receiver of Scandinavian-American Building Company. [414]

We, the undersigned, attorneys appearing on behalf of party litigants in the within entitled cause of action hereby accept service of notice of lodgment of statement of evidence in the within entitled matter on behalf of J. P. Duke, as Supervisor of Banking, this 3d day of July, A. D. 1922.

TEATS, TEATS & TEATS,

Attys. for Mullins Bros.

DAVIS & NEAL,

Attys. for Washington Brick, Lime & Sewer Pipe Co.

H. S. GRIGGS,

Atty. for St. Paul & Tac. Lbr. Co.

L. R. BONNEVILLE,

Atty. for Davis & Neal.

GROSSCUP & MORROW,

Attorneys for P. & G. Lumber Co. and Colby Star
Iron Wks.

R. S. HOLT,

Atty. for Far West Clay Co.

FITCH & ARNSTON, and

R. S. HOLT,

Attys. for Savage-Schofield Co.

BURKEY O'BRIEN & BURKEY,

Attys. for City Lbr. Agency.

E. N. EISNHOWER,

Atty. for Ajax Electric Co.

BATES & PETERSON,

Attys. for P. S. Iron & Steel Wks.

W. W. KEYES,

Atty. for Henry Mohr & Hunt & Mottet.

HAYDEN, LANGHORNE & METZ-
GER,

Attorneys for Complainant.

STILES & LATCHAM,

Attys. for Ben Olson Co. and F. H. Godfrey.

LUND & LUND,

DeWITT M. EVANS,

Attorney for F. R. Shoen. [415]

CHARLES BEDFORD,

Attorney for Hansen et al.

LOUIS J. MUSCIK,

Atty. for Liberty Lumber Fuel Co.

A. O. BURMEISTER,

Atty. for U. S. Mach. & Eng. Co.

LYLE, HENDERSON & CARN-
HAN,

Attys. for Tacoma Shipbuilding Co.

S. F. McANALLY,

Atty. for Chas. Owens & Boedecker. [416]

We, the undersigned, attorneys appearing on behalf of party litigants in the within entitled cause of action hereby accept service of notice of lodgment of statement of evidence in the within entitled matter on behalf of J. P. Duke, as Supervisor of Banking, this 8th day of July, A. D. 1922.

J. W. REYNOLDS,

Atty. for E. E. Davis & Co.

HARTMAN & HARTMAN,

Attys. for Morris et al.

HERR, BAYLEY & CROSON,

Attys. for Seattle Hardware Co.

H. A. P. MYERS,

Attys. for H. C. Green, etc.

BAUSMAN, O. B. & E., for WEBBER,

WALTER S. FULTON,

Atty. for Crane Co.

FLICK & PAUL,

Attys. for Tac. Mill. Sup.

D. R. HOPPE,

Atty. for Theodore Hedlund.

TUCKER & HYLAND,

Atty. for O. S. Larson.

W. M. HARVEY,

Atty. for Edw. Miller Cornice & Roofing Co.

BOGLE, MERRITT & BOGLE,

Attorneys for Otis Elevator Co.

F. D. OAKLEY and

KELLY & MacMAHON,

Attorneys for J. P. Duke as Supervisor, etc.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [417]

Petition for Appeal of Tacoma Millwork Supply Company.

Defendants, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company, through their attorneys, Flick & Paul, feeling themselves aggrieved do hereby appeal from a judgment and decree signed and entered in the foregoing cause and on the 2d day of May, 1922, in the District Court of the United States for the Western District of Washington, Southern Division, and from each and every part thereof, and do herewith present their several assignments of error, and do hereby pray the allowance of said appeal, and that so much and such portions of the record, the statement of facts and exhibits as may

be necessary to execute said appeal be forwarded from said court by the clerk of the District Court of the United States for the Western District of Washington, Southern Division, duly certified and authenticated under the seal of the said trial court, to the Circuit Court of Appeals for the 9th Circuit.

FLICK & PAUL,
Attorneys for Defendants Tacoma Millwork & Supply Company.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 5, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [418]

Order Allowing Appeal of Tacoma Millwork Supply Company.

BE IT REMEMBERED that this matter came on duly for hearing on the petition of R. T. Davis, Jr., and Ann Davis, as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the firm name and style of Tacoma Millwork Supply Company, for the allowance of their petition in appeal in the foregoing entitled cause from the decision of this Court made and entered on the 2d day of May, 1922, and the said appeal being from said decision to the Circuit Court of the United

States of America for the 9th Circuit; and this Court being duly advised in the premises,—

IT IS HEREBY ORDERED that the said appeal be allowed as prayed for, and the clerk of this court is hereby directed to formulate a true copy of the transcript of the records and proceedings to the extent necessary to properly present said appeal together with exhibits and other matters of record and the memorandum decision and formal decree of this Court, all duly authenticated and send same to the said Circuit Court of Appeals.

Done in open court this 3d day of May, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 3, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy Clerk. [419]

Bond on Appeal of Tacoma Millwork Supply Company.

KNOW ALL MEN BY THESE PRESENTS: That the said Tacoma Millwork Supply Company, a partnership consisting of Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, defendants in the foregoing cause and appellants herein, as principals, and Southern

Surety Company, as surety, are held and firmly bound unto complainant McClintic-Marshall Company, and to Scandinavian-American Building Company, a corporation, Scandinavian-American Bank, a corporation, G. Wallace Simpson, Claude P. Hay as State Bank Commissioner for the State of Washington, Forbes P. Haskell as Deputy State Bank Commissioner for the State of Washington, Savage-Scofield Company, a corporation, Puget Sound Iron & Steel Works, a corporation, E. E. Davis & Company, a corporation, St. Paul & Tacoma Lumber Company, a corporation, Far West Clay Company, a corporation, Henry Mohr Hardware Company, Inc., a corporation, Hunt & Mottet, a corporation, Edward Miller Cornice & Roofing Company, a corporation, Washington Brick, Lime & Sewer Pipe Company, a corporation, Otis Elevator Company, a corporation, United States [420] Machine & Engineering Company, a corporation, Colby Star Manufacturing Company, a corporation, Tacoma Shipbuilding Company, a corporation, Crane Company, a corporation, Ben Olson Company, a corporation, H. C. Greene doing business as H. C. Greene Iron Works, Carl Gerbers, and Fred S. Haines, copartners doing business under the firm name *any* style of Ajax Electric Company, H. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency, J. D. Mullins doing business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company, Morris Kleiner, doing business as

Liberty Lumber & Fuel Company, J. A. Soderberg, doing business as West Coast Monumental Company, Theodore Hedlund, doing business as Atlas Paint Company, F. W. Madsen and Gustaf Jonnasson, N. A. Hansen, A. J. Vanbuskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, F. Scheibal, Paul Scheibal, F. J. Kazda, W. Donellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. G. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short; and Robert M. Dabis and Frank C. Neal, copartners under the firm name and style of Davis & Neal, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Bodecker, William L. Owen, F. H. Bergen, F. H. Godfrey and W. E. Morris, defendants and cross-complainants herein named, in the full and just sum of Three hundred (\$300) dollars, for which sum, well and truly to be paid, we bind ourselves and our and each of our heirs, executors and administrators, successors and assigns, jointly and severally firmly by these presents. [421]

SEALED with our seals and dated this 3d day of May, A. D. 1922.

The condition of this obligation is such, that whereas, there was signed and entered in the District Court of the United States for the Western District of Washington, Southern Division, on the 2d

day of May, 1922, a judgment and decree in favor of said complainant above named, and others, adjudicating their respective rights and granting to said complainant and others of the cross-complainants and defendants herein mentioned rights superior to and prior to the claimed and alleged rights of appellants herein; and whereas the said principals herein have given due and proper notice of appeal and have appealed from the said judgment and decree of the said District Court of the United States of America for the Western District of Washington, Southern Division, and whereas said petition for and the appeal itself has been allowed by said District Court,—

NOW, THEREFORE, if the said defendant-appellants herein styled principals, shall prosecute this said appeal with effect and shall pay all costs on appeal and shall satisfy and perform the judgment or orders relating to such costs on appeal made and entered by either the Circuit Court of Appeals of the said District Court upon the filing of a mandate not exceeding the amount of Three Hundred (\$300) dollars, then this obligation shall be and become void, but otherwise shall remain in full force and effect.

TACOMA MILLWORK & SUPPLY CO.

By EDWARD H. FLICK,

Agent.

[Seal] SOUTHERN SURETY COMPANY.

By C. M. REESE,

Attorney in Fact.

Approved:

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 3, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [422]

Assignments of Error of Tacoma Millwork Supply Company.

Defendants, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company, through their attorneys, Flick & Paul, respectfully submit the following assignments of error upon which they rely as supporting their appeal from the judgment and decree entered on the 2d day of May, 1922, in said cause in the District Court of the United States for the Western District of Washington, Southern Division, and under which assignments of error said appellants seek reversal of the decision, judgment and decree of said trial court.

I.

That the District Court erred in refusing to

grant judgment and decree to appellants in the nature of a statutory lien for all materials prepared, as supported by the schedules attached to appellants' complaint, whether stored in warehouse distant from or at the factory, without distinction as to whether it was delivered upon the building, for the reason that under the statutes of the State of Washington in such cases made and provided the appellants [423] are entitled to a statutory material lien.

II.

That the District Court erred in refusing to grant a labor lien for work done on material specially designed for this building, for the reason that under the statutes of the State of Washington, in such cases made and provided, appellants are entitled to a labor lien for such work, or are in any event under such statutes entitled to be placed in the position of a subcontractor for the erection of interior finishing upon the building in issue.

III.

That the Court erred in not granting to said appellants an attorney's fee commensurate with the work involved and the amount recovered, for the reason that appellants were entitled to a statutory lien for labor and material delivered or furnished for use in construction of said building, and were entitled to have added to their judgment a reasonable attorney's fee under the said statutes.

IV.

That the said District Court erred in giving and

granting to certain of the lien claimants a status prior to and superior to that of the appellants herein, in that the lower Court granted to those delivering material upon the premises, a lien for all of such material, and gave to appellants a lien only for materials delivered upon the premises and refused a lien to appellants for material specially constructed by way of interior finishing for the property in issue but not delivered upon said premises; and particularly erred in refusing to grant such lien since delivery was made at warehouse under special direction of or by consent of defendant Scandinavian-American Building Company, hereinafter referred to as the owner. [424]

V.

That said District Court erred in giving to certain labor claimants or subcontractors a status prior and superior to the status of these appellants in the particular of refusing to allow these appellants a lien for labor done upon certain materials to make it more ready for erection, being particularly labor on erection, in the amount of \$6,043, and in this manner granted a laborer's lien to such laborers or to subcontractors doing laborers work upon said building who actually performed the labor upon the premises as distinguished from the performance of such labor away from the premises but upon material to be used for the construction of the building in issue, since the statutes of the State of Washington in such cases made and provided grant a lien for such labor as performed by said appel-

lants and grant no priority in the premises to parties so situated.

VI.

That the said District Court erred in granting to the said appellants a personal judgment for \$57,005.67, inclusive, of interest as appears in paragraph XXV of said decree, for materials prepared for use in construction of the building in issue, and in not granting a statutory lien for such materials upon said property for the reason that in such cases the statutes of the State of Washington provide a materialman's lien; and further erred in granting a personal judgment in the amount of \$6,043, plus interest, for certain labor performed away from the premises preparatory to erecting such material under an erection contract, and which labor did or would have facilitated the erection when placed upon the building, instead of granting a lien, for the reason that the statutes of the State of Washington, in such cases provide a laborers lien, or in any event a subcontractor's lien, and erred in giving a judgment in damages instead of judgment and lien as prayed for. [425]

VII.

That the said District Court erred in granting to the Scandinavian-American Bank rights, by reason of alleged advances under what is known as the \$600,000 mortgage, prior and superior to the rights of these appellants, excepting in so far as liens are granted to these appellants for a minor portion of their material, for the reason that the advances, so-called under the \$600,000 mortgage, as claimed

by said Bank, were made with the full knowledge that these lien claimants were told by the very officers of said Bank, who had full control of both said bank and said building company, and were likewise the officers of the building Company, that the building company had on hand \$400,000 in cash, and that the full amount of the \$600,000 mortgage would be used in the final completion of said building, whereas said officers all knew that said building company did not have a dollar on hand; and for the further reason that said building company was merely a creature of the bank or an entity constructed by the bank for its own purposes; and that said bank is estopped to claim any preference by reason of the representations made either as to advances under said \$600,000 mortgage as claimed, or because of the payment of the \$70,000 mortgage; and for the further reason that the said bank warranted said land as free and clear of encumbrances.

VIII.

That the said District Court erred in holding, as more fully appears from the memorandum decision filed in this cause, and dated the 31st day of March, 1922, that under the statutes of the State of Washington, relating to material and laborer's liens, the material must be furnished and delivered upon the premises, and the work must be done there, when in truth and in fact the said statutes do not provide for delivery at all but speak of the furnishing of material for use in the construction of a building. [426]

IX.

That the said District Court erred for the reason that said decision operates to take property without due process of law.

X.

That the said District Court erred for the reasons specifically set forth in the exceptions to the findings in said memorandum decision herein just referred to, and to the further exceptions filed to the judgment and decree against which these assignments of error are laid.

XI.

That said Court further erred in said judgment and decree in any and all findings or holdings which grant to any materialman, or to any claim other than the preferred class of laborer's rights superior and prior to these appellants as materialmen, and which grant any rights superior or prior to the rights of these appellants in their labor claim as recited in the schedules attached to said appellants' complaint.

XII.

That said Court further erred in not entering an order declaring that all of the material recited in the schedule attached to plaintiff's complaint was and is an integral part of the premises or property herein sought to be liened, for the reason that said appellant tendered all of said material within the time limited by their contract, that it was specially designed and worthless upon their hands, and that it was stored with the consent of the owner and retained in the storehouse away from the property

only because of the owner's convenience, and the safety of the material.

FLICK & PAUL,

Attorneys for Defendants Tacoma Millwork Supply Company.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 5, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [427]

Citation on Appeal of Tacoma Millwork Supply Company.

UNITED STATES OF AMERICA to McClintic-Marshall Company, a Corporation, Scandinavian-American Building Company, a Corporation, Scandinavian-American Bank, a Corporation, G. Wallace Simpson, Claude P. Hay as State Bank Commissioner for the State of Washington, Forbes P. Haskell as Deputy State Bank Commissioner for the State of Washington, Savage-Scofield Company, a Corporation, Puget Sound Iron & Steel Works, a Corporation, E. E. Davis & Company, a Corporation, St. Paul & Tacoma Lumber Company, a Corporation, Far West Clay Company, a Corporation, Henry Mohr Hardware Company, Inc., a Corporation, Hunt & Mottet, a Corporation, Edward Miller Cornice & Roofing Company, a Corporation, Washington Brick Lime & Sewer Pipe Company, a Corporation, Otis

Elevator Company, a Corporation, United States Machine & Engineering Company, a Corporation, Colby Star Manufacturing Company, a Corporation, Tacoma Shipbuilding Company, a Corporation, Crane Company, a Corporation, Ben Olson Company, a Corporation, H. C. Greene Doing Business as H. C. Greene Iron Works, Carl Gerbers and Fred S. Haines, Copartners Doing Business Under the Firm Name and Style of Ajax Electric Company, H. O. Matthews and Frank L. Johns, Copartners Doing Business Under the Firm Name and Style of City Lumber Agency, J. D. Mullins, Doing Business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, Copartners, Doing Business as P. & G. Lumber Company, Morris Kleiner Doing Business as Liberty Lumber & Fuel Company, J. A. Soderberg, Doing Business as West Coast Monumental Company, Theodore Hedlund, Doing Business as Atlas Paint Company, F. W. Madsen and Gustaf Gonasson, N. A. Hansen, A. J. Vanbuskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donegan, P. Hagstrom, Arthur Purvise, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten [428] W. Canaday, L. R. Lilly, F. McNair, Dave Chields, Ed Linberg, Joe Tikalsky, E. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterit,

Thomas S. Short; and Robert M. Davis and Frank C. Neal, Copartners Under the Firm Name and Style of Davis & Neal, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Bodecker, William L. Owen, F. H. Bergen, F. H. Godfrey and W. E. Morris.

BE IT REMEMBERED that this cause came on duly and regularly for trial in this Court, and that judgment and decree herein was rendered adjudicating the rights of the various complainants, cross-complainants or defendants on the 2d day of May, 1922, and that as asserted by appellants herein, said decision adversely affects the lien and other rights claimed by said appellants, and it appearing that due and proper petition in appeal was filed on the 3d day of May, 1922, in this court by said appellants Tacoma Millwork Supply Company, a partnership consisting of Ann Davis, and R. T. Davis, Jr., as Executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, which petition was, as appears from the records of this court duly allowed on the 3d day of May, 1922, and it appearing that all things necessary to a proper appeal in said cause has been fully accomplished,—

NOW, THEREFORE, you are hereby directed to appear in the United States Circuit Court of Appeals for the 9th Circuit, sitting in San Francisco, California, within thirty days from date of

this citation and there show cause why said decision herein referred to and the decree herein entered on the 2d day of May, 1922, should not be reversed or modified.

Done in open court this 3d day of May, 1922.

EDWARD E. CUSHMAN,

Judge. [429]

The undersigned attorneys for the parties litigant in this cause respectively appearing with their names do hereby acknowledge due service of true copy of petition and appeal, citation and assignments of error, and further acknowledge notice of proposed presentation of a short record on appeal June 12th, 1922, at 10 A. M. in the above court for settlement by his Honor Judge Cushman.

GUY E. KELLY,

THOMAS MacMAHON,

FRANK D. OAKLEY,

Attorneys for Scandinavian-American Bldg. Co.;
Scandinavian-American Bank; J. P. Duke as
State Bank Commissioner for the State of
Wash., and Forbes P. Haskell as Deputy State
Bank Commissioner for the State of Washing-
ton.

WALTER S. FULTON,

Attorney for Crane & Co.

Copy of the within received this 5th day of May,
1922.

HARTMAN & HARTMAN,

Attorney for W. E. Morris.

JAMES W. REYNOLDS,

Attorney for E. E. Davis & Co.

H. A. P. MYERS,

Attorney for H. C. Green, etc.

BOGLE, MERRITT & BOGLE,

Atty. for Otis Elevator Co.

DAVIS & NEAL,

Atty. for Washington Brick Lime & Sewer Pipe
Co.

W. W. KEYES,

Atty. for Henry Mohr and Hunt & Mottet.

HERBERT S. GRIGGS,

L. R. BONNEVILLE,

Atty. for St. Paul & Tac. Lbr. Co.

L. R. BONNEVILLE,

Atty. for Davis & Neal.

R. S. HOLT,

Atty. for Far West Clay Co.

TEATS & TEATS,

Atty. for J. D. Mullins Bros.

B. S. GROSSCUP,

W. C. MORROW,

CHAS. A. WALLACE,

Atty. for P. & G. Lumber Co.

B. S. GROSSCUP,

W. C. MORROW,

CHAS. A. WALLACE,

Atty. for Colby Star Mfg. Co. [430]

S. F. McANALLY,

Atty. for Bodecker & Owens.

E. N. EISENHOWER,

Atty. for Ajax Electric Co.

BATES & PETERSON,

Atty. for P. S. Iron & Steel Wks.

BURKEY, O'BRIEN & BURKEY,

Atty. for City Lumber Agency.

FITCH & ARNTSON,

Atty. for Savage Scofield Co.

LOUIS J. MUSCEK,

Atty. for Liberty Lumber Co.

DeWITT M. EVANS,

Atty. for F. R. Schoen.

CHARLES BEDFORD,

Atty. for labor claims.

STILES & LATCHAM,

Atty. for Ben Olson Company and F. H. Godfrey.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 5, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [431]

Statement of Facts.

The following attached pages, 48 in number, with exhibits thereto attached, is proposed as the statement of facts involving the issues material to the appeal of the Tacoma Millwork Supply Company as corrected in accordance with his Honor Judge Cushman's rulings under date of July 21st, 1922.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. July 28, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [432]

**Petition for Appeal of Washington Brick, Lime &
Sewer Pipe Company.**

To Honorable E. E. CUSHMAN, Judge:

The Washington Brick, Lime & Sewer Pipe Company, defendant and cross-complainant in the above-entitled action, feeling itself aggrieved by the decree made and entered in this case on the 2d day of May, 1922, does hereby appeal from said decree to the Circuit Court of Appeals *from* the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and it prays that its appeal be allowed, that citation issue as provided by law, and that a transcript of the record, proceedings, and papers, upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching security to be required of it to perfect its appeal, be made.

CHAS. P. LUND,
DAVIS & NEAL,

Attorneys for Washington Brick Lime & Sewer
Pipe Company.

1115 Fidelity Building,
Tacoma, Wash.

The above petition granted and the appeal allowed, upon giving bond conditioned as required by law in the sum of \$500.00.

Dated July 10, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [433]

Assignment of Errors of Washington Brick, Lime & Sewer Pipe Company.

Now comes the Washington Brick, Lime & Sewer Pipe Company, appellant herein, and one of the defendants and cross-complainants in the above-entitled action, and assigns the following errors as grounds for its appeal herein:

I.

The District Court erred in refusing to grant to the Washington Brick, Lime & Sewer Pipe Company, a judgment and decree awarding a statutory lien for terra cotta fabricated and shipped to Tacoma, Washington, and stored ready for delivery and use, for the reason that under the statutes of the State of Washington, in such cases, this appellant was entitled to a statutory materialman's lien therefor.

II.

The District Court erred in refusing to grant to the Washington Brick, Lime & Sewer Pipe Company, a judgment and decree awarding a statutory lien for terra cotta fabricated and stored at its plant, for the reason that under the statutes of the State of Washington, in such cases this appellant was entitled to a statutory materialman's lien therefor. [434]

III.

The District Court erred in holding that no part of the terra cotta fabricated by this appellant was delivered to the Scandinavian-American Building Company, for the reason that the same is contrary to the evidence in the case.

IV.

The District Court erred in holding that the title to the terra cotta fabricated by this appellant was at all times vested in it, for the reason that the same is contrary to the evidence in the case.

V.

The District Court erred in giving and granting to all of the lien claimants (except the laborers named in paragraphs IV and V of the decree), to whom statutory liens were decreed, a status prior and superior to this appellant, for the reason that under the evidence in the case and the law of the State of Washington, this appellant was entitled to have its claim, for material fabricated, established as of the same rank as the materialmen's liens which were decreed.

VI.

The District Court erred in holding that, under the statutes of the State of Washington, no lien can be established or decreed, except for material delivered upon the premises of the builder, for the reason that the statutes and laws, of the State of Washington, do not prescribe that delivery must be made at any specified place.

VII.

The District Court erred in failing and refusing

to decree that the Scandinavian-American Bank and the Scandinavian-American Building Company were one corporation in equity, for the reason that under the evidence in the case, [435] the corporations were identical.

VIII.

The District Court erred in not allowing to this appellant an attorney's fee, in at least the sum of 5,800 dollars as a part of the judgment in its favor.

IX.

The District Court erred in granting a judgment in favor of J. P. Duke, as Supervisor of Banks for the State of Washington, on account of moneys paid in procuring the assignment of the mortgage, referred to in paragraph thirty-four of the judgment, in the sum of \$72,366.35, and interest amounting to \$4,293.73, for the reason that such judgment is contrary to the law and the evidence.

X.

The District Court erred in granting a judgment in favor of J. P. Duke, as Supervisor of Banks for the State of Washington, on account of moneys advanced by the Scandinavian-American Bank to and for the benefit of the Scandinavian-American Building Company, in the sum of \$232,094.42, and interest amounting to \$19,136.62, for the reason that such judgment is contrary to the law and the evidence.

XI.

The District Court erred in denying appellant's claim of lien, for the reason that the judgment

operates to deprive this appellant of its property without due process of law.

CHAS, P. LUND,
DAVIS & NEAL,

Solicitors for the Washington Brick, Lime &
Sewer Pipe Company.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Jul. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [436]

**Bond on Appeal of Washington Brick, Lime &
Sewer Pipe Company.**

KNOW ALL MEN BY THESE PRESENTS:
That we, Washington Brick, Lime & Sewer Pipe Company, as principal, and Hartford Accident & Indemnity Company, a corporation authorized to do a surety business in the State of Washington, as surety, acknowledge ourselves to be jointly indebted to the McClintic-Marshall Company, a corporation, Appellee in the above case, and the Scandinavian-American Building Co., a corporation, the Scandinavian-American Bank, a corporation, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Co., G. Wallace Simpson, P.

Claude Hay, as State Bank Commissioner for the State of Washington, Forbes P. Haskell, as Deputy State Bank Commissioner for the State of Washington, Savage-Scofield Company, a corporation, Puget Sound Iron & Steel Works, a corporation, E. E. Davis & Company, a corporation, St Paul & Tacoma Lumber Company, a corporation, Far West Clay Company, a corporation, Henry Mohr Hardware Company, Inc., a corporation, Hunt & Mottet, a corporation, Edward Miller Cornice & Roofing Company, a corporation, Otis Elevator Company a corporation, United States Machine & Engineering Co., a corporation, Crane Company, a corporation, Ben Olson Co., a corporation, H. C. Greene, doing business as H. C. Greene Iron Works, Carl Gebbers and Fred S. Haines, copartners doing business under the firm name and style of Ajax Electric Company, S. O. Matthews and [437] Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency, J. D. Mullins, doing business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company, Morris Kleiner, doing business as Liberty Lumber & Fuel Company, J. A. Soderberg, doing business as West Coast Monumental Co., Theodore Hedlund, doing business as Atlas Paint Col, F. W. Madsen, Gustaf Jonasson, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Ray Farnsworth, C. B. Dustin, L. J.

Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe. Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswald, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, and Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergren, F. H. Godfrey, and W. E. Morris, John P. Duke, as Supervisor of Banking, Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company, Forbes P. Haskell, as Assistant Supervisor of Banking, defendants and cross-complainants in the above-entitled case, in the sum of Five Hundred (\$500) Dollars.

CONDITIONED that, whereas, on the 2d day of May, 1922, in the District Court of the United States for the Western District [438] of Washington, in a suit pending in that court wherein the McClintic-Marshall Company was complainant, and the Scandinavian-American Building Company, a corporation, and Washington Brick Lime & Sewer Pipe Company, together with other persons and corporations, were defendants, numbered on the Equity Docket as No. 117-E, a decree was rendered from which decree the Said Washington Brick Lime & Sewer Pipe Company has obtained an appeal and filed a copy thereof in the office of the Clerk of court, to reverse the said decree, and a citation directed to the said McClintic-Marshall

Company and to all of the defendants and cross-complainants, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California, within thirty (30) days from the 7th day of July, 1922.

NOW, if the said Washington Brick Lime & Sewer Pipe Company shall prosecute its appeal to effect an answer all damages and costs if it fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

Dated this 10th day of July, 1922.

WASHINGTON BRICK, LIME & SEWER
PIPE CO.

By CHAS P. LUND,
DAVIS & NEAL,
Its Attorneys,
(Principal).

HARTFORD ACCIDENT & INDEMNITY
COMPANY,

By JOHN F. LYON,
Attorney in Fact,
(Surety).

[Corporate Seal] Attest: L. E. MURPHY.

The foregoing bond approved July 10, 1922.

EDWARD E. CUSHMAN,
Judge. [439]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [440]

Citation of Washington Brick, Lime & Sewer Pipe Company.

UNITED STATES OF AMERICA to McClin-tic-Marshall Company, a corporation, Scan-dinavian-American Building Company, a cor-poration, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, de-ceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, copartners doing busi-ness under the name and style of Tacoma Mill-work Supply Co., G. Wallace Simpson, P. Claude Hay as State Bank Commissioner for the State of Washington, Forbes P. Haskell as Deputy State Bank Commissioner for the State of Washington, Savage-Scofield Com-pany, a corporation, Puget Sound Iron & Steel Works, a corporation, E. E. Davis & Company, a corporation, St. Paul & Tacoma Lumber Co., a corporation, Far West Clay Company, a cor-poration, Henry Mohr Hardware Company, Inc., a corporation, Hunt & Mottet, a corpora-tion, Edward Miller Cornice & Roofing Com-pany, a corporation, Washington Brick, Lime & Sewer Pipe Company, a corporation, Otis Ele-vator Company, a corporation, United States Machine & Engineering Co., a corporation, Crane Company, a corporation, Ben Olson Co., a corporation, H. C. Greene, doing business as H. C. Greene Iron Works, Carl Gebbers and

Fred S. Haines, copartners, doing business under the firm name and style of Ajax Electric Company, S. O. Matthews and Frank L. Johns, copartners doing business under the firm name and style of City Lumber Agency, J. D. Mullins doing business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company, Morris Kleiner, doing business as Liberty Lumber & Fuel Company, J. A. Soderberg, doing business as West Coast Monumental Co., Theodore Hedlund, doing business as Atlas Paint Co., F. W. Madsen, Gustaf Jonasson, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, and Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Anfang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey, and W. E. Morris, John P. Duke, as Supervisor of Banking, Forbes P. Haskell, as Receiver of

Scandinavian-American Building Company,
Forbes P. Haskell, as Assistant Supervisor of
Banking, GREETINGS:

YOU ARE HEREBY NOTIFIED that in a certain case in equity in the United States District Court, in and for the Western District of Washington, Southern Division, wherein McClintic-Marshall Company, a corporation, is complainant, and the Washington Brick, Lime & Sewer Pipe Company, a corporation, et al., are defendants and cross-complainants, in which case decree was rendered by the said court on the 2d day of May, 1922, an appeal has been allowed the Washington Brick, Lime & Sewer Pipe Company, cross-complainant therein to the Circuit Court of Appeal.

You are hereby cited and admonished to be and appear in said Circuit Court of Appeal *from* the Ninth Circuit, sitting in San Francisco, California, within thirty days from the date of this citation, and there show cause if any there be why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Done in open court this 10th day of July, 1922.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [441]

Notice of Filing Assignment of Errors and Lodgment of Statement of Facts of Washington Brick, Lime & Sewer Pipe Company.

To Hayden, Langhorne & Metzger, Attorneys for Plaintiff and to All Attorneys for Defendants.

TAKE NOTICE that the Washington Brick, Lime & Sewer Pipe Company on the 10th day of July, 1922, filed with the Clerk of said court, its assignment of errors on appeal to the Circuit Court of Appeals of the Ninth Circuit, and that on the same day the said Company lodged with said clerk its proposed statement of the testimony on its said appeal; and take notice, further, that on Friday, the 21st day of July, 1922, at ten o'clock in the forenoon, or as soon thereafter as the matter can be heard, the undersigned will apply to the said Court to approve said statement.

DAVIS & NEAL,

CHARLES P. LUND,

Attorneys for Washington Brick, Lime & Sewer Pipe Co.

1115 Fidelity Bldg.,

Tacoma, Washington.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 21, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [442]

**Admission of Service of Citation, Notice of Filing
Assignment of Errors and Lodgment of State-
ment of Facts.**

Receipt of copy of Citation, Notice of Filing Assignment of Errors and Lodgment of Statement of Facts is admitted this 10th day of July, 1922.

WALTER M. HARVEY,

Per N. GROSS,

Attorneys for Edward Miller Cornice & Roofing
Company.

J. F. FITCH,

R. S. HOLT,

Attys. for Savage-Scofield Co.

TEATS, TEATS & TEATS,

Attys. for J. D. Mullins Bros.

BATES & PETERSON,

Attys. for Puget Sound Iron & Steel Works.

H. S. GRIGGS,

L. R. BONNEVILLE,

Attys. for St. Paul & Tac. Lbr.

W. W. KEYES,

Atty. for Henry Mohr Hdwe. Co. and Hunt &
Mottet.

Atty. for H. C. Greene Iron Wks.

BURKEY, O'BRIEN & BURKEY,

Atty. for City Lumber Agency.

LOUIS J. MUSCEK,

Atty. for Liberty Lumber & Fuel Co.

A. O. BURMEISTER,

Atty. for U. S. Machine & Engineering Co.

DeWITT M. EVANS,

Atty. for F. R. Shoen.

D. R. HOPPE,

Atty. for Atlas Paint Co.

S. F. McANALLY,

Atty. for C. H. Boedecker and William L. Owen.

CHAS. BEDFORD,

Atty. for N. A. Hansen, et al.

HAYDEN, LANGHORNE & METZ-
GER,

Attorneys for McClintic-Marshall Company.

KELLY & MacMAHON and

F. D. OAKLEY,

Attorneys for Scandinavian-American Bldg. Co.
Scandinavian-American Bank.

FLICK & PAUL,

Attorneys for Ann Davis, et al., Doing Business as
Tacoma Millwork Supply Company.

PETERS & POWELL,

Attorneys for E. E. Davis & Co.

R. S. HOLT,

Attorney for Far West Clay Company.

GROSSCUP & MORROW,

Attorney for Colby Star Mfg. Co. and P. & G. Lum-
ber Co.

E. N. EISENHOWER,

Atty. for Ajax Electric Co.

BOGLE, MERRITT & BOGLE,

Atty. for Otis Elevator Co.

Copy of the within received this 10th day of July,
1922.

HARTMAN & HARTMAN,

Atty. for W. W. Morris.

W. S. FULTON,

Atty. for Crane Co.

STILES & LATCHAM,

Atty. for Ben Olson Co.

STILES & LATCHAM,

Atty. for F. H. Godfrey.

DAVIS & NEAL,

L. R. BONNEVILLE,

Attys. for Davis & Neal.

H. A. P. MYERS,

Attorney for H. C. Greene Iron Wks. [443]

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Southern
Division. Jul. 21, 1922. F. M. Harshberger, Clerk.
By Ed M. Lakin, Deputy. [444]

Petition for Appeal of Ben Olson Company.

Defendant, Ben Olson Company, a corporation,
through its attorneys, Stiles & Latcham, feeling
itself aggrieved, does hereby appeal from a judg-
ment and decree signed and entered in the fore-
going cause on the 2d day of May, 1922, in the Dis-
trict Court of the United States for the Western
District of Washington, Southern Division, and
from each and every part thereof, and does here-
with present its several assignments of error, and

does hereby pray the allowance of said appeal, and that so much and such portions of the record, the statement of facts and exhibits as may be necessary to execute said appeal be forwarded from said court by the Clerk of the District Court of the United States for the Western District of Washington, Southern Division, duly certified and authenticated under the seal of the said trial court, to the Circuit Court of Appeals for the 9th Circuit.

STILES & LATCHAM,

Attorneys for Defendant, Ben Olson Co.

Appeals allowed: Bond \$1000.00.

Dated June 15, 1922.

EDWARD E. CUSHMAN,

District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 15, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [445]

Assignments of Error of Ben Olson Company.

Defendant, Ben Olson Company, a corporation, through its attorneys, Stiles & Latcham, respectfully submits the following assignments of error upon which it will reply as supporting its appeal from the judgment and decree entered on the 2d day of May, 1922, in said cause in the District Court of the United States for the Western District of Washington, Southern Division, and under which assignments of error said appellant seeks reversal

of the decision, judgment and decree of said trial Court.

I.

This District Court erred in refusing to grant its judgment and decree to appellant in the nature of a statutory lien for all materials procured to be purchased and stored ready for delivery and use as supported by the evidence of the cause, whether stored in warehouse or in appellant's shop, without regard to whether it was delivered at the building or not, for the reason that under the statutes of the State of Washington, in such cases made and provided, the appellant was entitled to a statutory Contractor's Lien.

II.

The District Court erred in refusing to grant a lien for work done upon and materials furnished at the building, for the reason that under the statutes of the State of Washington, in such cases made and provided, appellant was entitled to a lien for such work and material furnished. [446]

III.

The District Court erred in not granting to said appellant an attorney's fee commensurate with the work involved and the amount recovered, for the reason that appellant was entitled to a statutory lien for labor done and material delivered or furnished for the use in construction of said building, and was entitled to have added to its judgment a reasonable attorney's fee under the said statutes.

IV.

The District Court erred in giving and granting

to certain of the lien claimants a status prior to and superior to that of the appellant herein, in that the lower court granted to those delivering material upon the premises a lien for all of such material, and gave to appellant no lien whatever therefor; and refused a lien to appellant for material specially procured for the building being constructed, but not delivered upon the premises; and particularly erred in refusing to grant such lien since delivery was made at warehouse and shop of appellant.

V.

The District Court erred in granting to the said appellant a reasonable judgment for \$14,422.03, inclusive of interest, as appears in Paragraph XXVI of said decree, on account of its contract and for materials and labor furnished in the construction of the building, in issue, and in not granting a statutory lien for such judgment upon said real property for the reason that in such cases the statutes of the State of Washington provide a Contractor's Lien.

VI.

That the said District Court erred in granting to the Scandinavian-American Bank rights, by reason of alleged advances under what is known as the \$600,000 mortgage, prior and superior to the rights of this appellant, for the reason that the advances, so called under the \$600,000 mortgage, as claimed by said bank, were made [447] with the full knowledge that this lien claimant was told by the very officers of said Bank, who had full control

of both said Bank and said Building Company, and were likewise the officers of the Building Company, that the Building Company had on hand \$400,000 in cash, and that the full amount of the \$600,000 mortgage would be used in the final completion of said building; whereas said officers all knew that said Building Company did not have a dollar on hand; and for the further reason that said Building Company was merely a creature of the bank or an entity constructed by the bank for its own purposes; and that said bank is estopped to claim any preference by reason of the representations made, either as to advances under said \$600,000 mortgage as claimed, or because of the payment of the \$70,000 mortgage; and for the further reason that the said bank warranted said lands as free and clear of encumbrances.

VII.

That the said District Court erred in holding, as more fully appears from the memorandum decision filed in this cause, and dated the —— day of April, 1922, that under the statutes of the State of Washington, relating to material and laborer's liens, the material must be furnished and delivered upon the premises, and the work must be done there, when in truth and in fact the said statutes do not provide for delivery at all but speak of the furnishing of material for use in the construction of a building.

VIII.

The District Court erred in its failure and refusal to decree that the Scandinavian-American Bank and the Scandinavian-American Building Company were one corporation in equity, and to allow appel-

lant's judgment and the rejected part of its claims as a claim allowed against the assets and property of said bank in the hands of John P. Duke, Supervisor of Banks; although in its decision of the case, and in Paragraph XXXVI of the Decree [448] herein, it was found and adjudged that said Scandinavian-American Building Company of Tacoma, for the purpose of providing the said bank with suitable banking quarters and was at all times subject to the control of and controlled by said bank.

IX.

The District Court erred in entering judgment in favor of John P. Duke, as Supervisor of Banking in Paragraph XXXVII of the Decree herein, for \$72,366.35, and interest, on account of moneys paid by him in procuring an assignment of a mortgage on the building premises; for the reason that the payment of such moneys was merely the payment of the bank's own debt.

X.

The District Court erred in entering judgment in favor of John P. Duke, as Supervisor of Banking, against the Scandinavian-American Building Company for \$232,094.42, and interest, by Paragraph XXVIII of the Decree herein, and in giving to said judgment a status equal in rank with the judgment entered in favor of appellant, for the reason that said sum represented moneys alleged to have been advanced and paid by the Scandinavian-American Bank for labor and materials used in the construction of said building, which building was being constructed by said bank, through its agent, said Scan-

dinavian-American Building Company, after it had contracted with appellant for its labor and materials and had, to the knowledge of the bank represented that it had \$400,000 in money on hand for the construction of said building and that it also had negotiated its \$600,000 mortgage bonds, the proceeds of which it would have for construction, none of which was true, as found in Paragraph XXXIII of said Decree; and, further, said Court erred in entering judgment because the court had no jurisdiction to render such a judgment in a lien foreclosure case.

STILES & LATCHAM,

Attorneys for Defendant, Ben Olson Co. [449]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 15, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [450]

Citation of McClintic-Marshall Company.

UNITED STATES OF AMERICA to McClintic-Marshall Company, a Corporation, Scandinavian-American Building Company, a Corporation, Scandinavian-American Bank, a Corporation, Ann Davis and R. T. Davis, Jr., as Executors of the Estate of R. T. Davis, Deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, Copartners Doing Business Under the Name and

Style of Tacoma Millwork Supply Company, G. Wallace Simpson, Claude P. Hay as State Bank Commissioner for the State of Washington, Forbes P. Haskell as Deputy State Bank Commissioner for the State of Washington, Savage-Scofield Company, a Corporation, Puget Sound Iron & Steel Works, a Corporation, E. E. Davis & Company, a Corporation, St. Paul & Tacoma Lumber Company, a Corporation, Far West Clay Company, a Corporation, Henry Mohr Hardware Company, Inc., a Corporation, Hunt & Mottet, a Corporation, Edward Miller Cornice & Roofing Company, a Corporation, Washington Brick, Lime & Sewer Pipe Company, a Corporation, Otis Elevator Company, a Corporation, United States Machine & Engineering Company, a Corporation, Colby Star Manufacturing Company, a Corporation, Tacoma Shipbuilding Company, a Corporation, Crane Company, a Corporation, H. C. Greene, Doing Business as H. C. Greene Iron Works, Carl Gerbers and Fred S. Haines, Copartners Doing Business Under the Firm Name and Style of Ajax Electric Company, H. O. Matthews and Frank L. Johns, Copartners Doing Business Under the Firm Name and Style of City Lumber Agency, J. D. Mullins, Doing Business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, copartners doing business as P. & G. Lumber Company, Morris Kleiner, Doing Business as Liberty Lumber & Fuel Company, J. A. Soderberg, Doing Business as West

Coast Monumental Company, Theodore Hedlund [451] Doing Business as Atlas Paint Company, F. W. Madsen and Gustaf Jonasson, N. A. Hansen, A. J. Vanbuskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Schields, Ed. Lindberg, Joe Tilkalsky, E. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short; and Robert M. Davis and Frank C. Neal, Copartners Under the Firm Name and Style of Davis & Neal, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. H. Bergen, F. H. Godfrey and W. E. Morris,—

BE IT REMEMBERED, that this cause came on duly and regularly for trial in this court, and that judgment and decree herein was rendered adjudicating the rights of the various complainants, cross-complainants and defendant on the 2d day of May, 1922, and that, as asserted by appellant herein, said decision adversely affect the lien and other rights claimed by said appellant, and it appearing that due and proper petition in appeal was filed on the 15 day of June, 1922, in this court by said appellant, Ben Olson Company, a corporation, which petition was, as appears from the records of this court,

duly allowed on the 15th day of June, 1922, and it appearing that all things necessary to a proper appeal in said cause has been fully accomplished,—

NOW, THEREFORE, you are hereby directed to appear in the United States Circuit Court of Appeals for the 9th Circuit, sitting in San Francisco, California, within thirty days from date of [452] this citation and there show cause why said decision herein referred to and the decree herein entered on the 2d day of May, 1922, should not be reversed or modified.

Done in open court this 15th day of June, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 15, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [453]

Bond on Appeal of Ben Olson Company.

KNOW ALL MEN BY THESE PRESENTS: That we, the Ben Olson Company, a corporation, as principal, and the Fidelity & Deposit Company of Maryland, a corporation, organized under the laws of Maryland, and qualified to become surety on judicial bonds in the State of Washington, are held and firmly bound unto the McClintic-Marshall Company, a corporation, and all other appellees in the above-entitled cause, in the sum of Five Hundred Dollars to be paid to the said obligees,

their respective successors, heirs and assigns; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 28th day of September, 1922.

Nevertheless the condition of the above obligation is such, that, WHEREAS, the above-named Ben Olson Company, a defendant in the above-entitled cause has appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment entered in the above-entitled cause in so far as the same denied certain relief to said defendant.

NOW, THEREFORE, if the above-named defendant shall prosecute said appeal to effect, and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; but otherwise it shall be and remain in full force and effect. [454]

WITNESS our seals and names hereto affixed the day and year above written.

BEN OLSON COMPANY,

By O. B. OLSON,

President.

FIDELITY & DEPOSIT COMPANY OF
MARYLAND.

[Corporate Seal]

By H. T. HANSEN,

Attorney in Fact.

Approved, October 9, 1922.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 9, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [455]

**Notice of Filing Assignment of Errors and Lodging
Statement of Facts of Ben Olson Company.**

To Hayden, Langhorne & Metzger, Attorneys for
Complainant, and to Attorneys for All Defendants
Appearing.

TAKE NOTICE, that Ben Olson Company, on the 15th day of May, 1922, filed with the Clerk of the said Court its assignment of errors on appeal to the Circuit Court of Appeals, of the Ninth Circuit; and that on the same day said Ben Olson Company lodged with said Clerk its proposed statement of the testimony, on its said appeal; and take notice further that on Friday, the 30th day of June, 1922, at 10 o'clock in the forenoon, or as soon thereafter as the matter can be heard, the undersigned will apply to the said Court to approve said statement.

Respectfully,

STILES & LATCHAM,

Attorneys for Ben Olson Company. [456]

Copies of the foregoing notice of filing of assignment of errors and lodgment of statement of testimony and time and place of hearing, and of

appellant Ben Olson Company's citation on appeal admitted this 15th day of June, 1922.

HAYDEN, LANGHORNE & METZGER,
Attorneys for McClintic-Marshall Company.

KELLY, McMAHON & F. D. OAKLEY,
Attorneys for Scandinavian-American Building
Company and Forbes P. Haskell, Receiver of
Scandinavian-American Building Company.

KELLY, McMAHON & F. D. OAK-
LEY,

Attorneys for Scandinavian-American Bank of Ta-
coma, John P. Duke as Supervisor of Banks,
Successor of Claude P. Hay, as State Bank
Commissioner.

FLICK & PAUL,
Attorneys for Ann Davis, et al., Copartners Under
the Name of Tacoma Millwork Supply Co.

FITCH & ARNTSON,
Attorneys for Savage-Schofield Company
BATES & PETERSON,
Attorneys for Puget Sound Iron & Steel Works.

Attorneys for E. E. Davis & Company.
H. S. GRIGGS,
Attorneys for St. Paul & Tacoma Lumber Co.

R. S. HOLT,
Attorney for Far West Clay Company.
W. W. KEYES,

Attorney for Henry Mohr Hardware Company.
DAVIS & NEAL,

Attorneys for Washington Brick, Lime & Sewer Co.

BOGLE, MERRITT & BOGLE,
Attorneys for Otis Elevator Company.

GROSSCUP & MORROW,
Attorneys for Colby Star Manufacturing Co.

WALTER S. FULTON,
Attorney for Crane Company.

H. A. P. MYERS,
Attorneys for H. C. Greene, Doing Business as H.
C. Greene Iron Works.

E. N. EISENHOWER,
Attorney for Carl Gerbers and Fred S. Haines,
Copartners Under the Name of Ajax Electric
Company.

BURKEY, O'BRIEN & BURKEY,
Attorneys for H. O. Matthews and Frank L. Johns,
Doing Business as City Lumber Agency.

TEATS, TEATS & TEATS,
Attorneys for J. D. Mullins, Doing Business as
J. D. Mullins Bros.

GROSSCUP & MORROW,
Attorneys for C. H. Graves, Emma Graves and
S. J. Pritchard, Doing Business as Copartners
Under the Firm Name of P. & G. Lumber
Company.

LOUIS J. MUSCEK,
Attorney for Morris Kleiner, Doing Business as
Liberty Lumber & Fuel Company.

CHARLES BEDFORD,
Attorney for N. A. Hansen, and 36 Other Defend-
ants.

L. R. BONNEVILLE,

Attorney for Robert M. Davis and Frank C. Neal,
Doing Business as Davis & Neal.

DE WITT M. EVANS,

Attorney for F. R. Schoen. [458]

S. F. McANALLY,

Attorney for C. H. Boedecker and William M.
Owen.

STILES & LATCHAM,

Attorneys for F. H. Godfrey.

HARTMAN & HARTMAN,

Attorneys for W. E. Morris.

WALTER M. HARVEY, per G.

Attorney for Edward Miller Cornice & Roofing
Company.

W. W. KEYES,

Attorney for Hunt & Mottet, a Corporation.

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Southern
Division. Jul. 6, 1922. F. M. Harshberger, Clerk.
By Alice Huggins, Deputy. [459]

Petition for Appeal of J. P. Duke.

J. P. Duke, as Supervisor of Banks of the State
of Washington, and as successor in office to the
defendant, Claude P. Hay, as State Bank Commis-
sioner of the State of Washington, Forbes P. Has-
kell, Jr., as Special Deputy Supervisor of Banks
of the State of Washington, and Scandinavian-
American Bank of Tacoma, a corporation, feeling

themselves aggrieved by the decree made and entered in the above-entitled cause on the 2d day of May, 1922, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reason specified in their assignment of errors, which is filed herewith, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. And petitioners pray that the proper order touching the security to be required of them to perfect their appeal be made.

KELLY & MacMAHON,

F. D. OAKLEY,

Attorneys for said Petitioners.

The foregoing petition for appeal is hereby allowed this 22d day of July, 1922, upon giving bond conditioned as required by law in the sum of \$500.00.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 22, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [460]

Bond on Appeal of J. P. Duke.

KNOW ALL MEN BY THESE PRESENTS:
That we, J. P. Duke, as Supervisor of Banks of

the State of Washington, and as successors in office to the Defendant Claude P. Hays, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, Jr., as Special Deputy Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, a corporation, as principals, and the National Surety Company of New York, a corporation, organized under the laws of the State of New York, and authorized to transact the business of Surety in the State of Washington, as Surety, are held and firmly bound unto McClintic-Marshall Company, Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant, Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Co., G. Wallace Simpson, Savage-Scofield Company, a corporation, Puget Sound Iron & Steel Works, a corporation, E. E. Davis & Company, a corporation, St. Paul & Tacoma Lumber Company, a corporation, Far West Clay Company, a corporation, Henry Mohr Hardware Company, Inc., a corporation, Hunt & Mottet, a corporation, Edward Miller Cornice & Roofing Company, a corporation, Washington Brick, Lime & Sewer Pipe Company, a corporation, Otis Elevator Company, a corporation, United States Machine & Engineering Co., a corporation, Crane Company, a corporation, Ben Olson Co., a corporation, H. C. Greene doing business as H. C. Greene Iron Works, Carl Gebbers and Fred S.

Haines, copartners doing business under the firm name and style of Ajax Electric Company, S. O. Matthews and Frank L. Johns, copartners [461] doing business under the firm name and style of City Lumber Agency, J. D. Mullins doing business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, copartners doing business as J. & G. Lumber Company, Morris Kleiner, doing business as Liberty Lumber & Fuel Company, J. A. Soderberg, doing business as West Coast Monumental Co., Theodore Hedlund, doing business as Atlas Paint Co., F. W. Madsen, Gustaf Jonasson, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed. Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, E. A. Fetterly, Thomas S. Short, and Robert M. Davis and Frank C. Neal, copartners doing business under the firm name and style of Davis & Neal, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey, Seattle Hardware Company, a corporation, Frederick Webber and O. S. Larson, and W. E. Morris, Colby Star Manufacturing Company, a corporation, Tacoma Shipbuilding Company, a corpora-

tion, Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company, a corporation, the defendants above named, in the full and just sum of Five Hundred Dollars (\$500.00); to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and [462] successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of July, 1922.

THE CONDITION of this obligation is such, that whereas, in the above-named action there was signed and entered in the District Court of the United States, for the Western District of Washington, Southern Division, on the 2d day of May, 1922, a judgment and decree, in favor of the complainant above named and others adjudging their respective rights and granting to said complainant and others of the cross-complainants and defendants herein mentioned, rights superior to and prior to the claimed and alleged rights of appellant herein, and whereas the said principal herein has obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the court to reverse the said decree and a citation directed to the said complainant and the other defendants and cross-complainants herein named admonishing them and each of them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held

in the City of San Francisco, in the State of California, within thirty days from July 31, 1922.

Now, if the said J. P. Duke, as Supervisor of Banks of the State of Washington, and as successor in office to the defendant Claude P. Hay, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, Jr., as Special Deputy Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, a corporation, shall prosecute their appeal to effect and answer all damages and costs if they fail to [463] make their plea good, then the above obligation to be void, else to remain in full force and virtue.

JOHN P. DUKE,
Supervisor of Banks of the State of Washington,
etc.

FORBES P. HASKELL, Jr.,
Special Deputy Supervisor of Banks of the State
of Washington.

SCANDINAVIAN-AMERICAN BANK OF
TACOMA.

By GUY E. KELLY and
THOMAS MacMAHON,
Its Attorneys.

NATIONAL SURETY COMPANY OF
NEW YORK.

By FREDERIC D. METZGER,
Resident Vice-President.

[Corporate Seal]

By W. B. GILHAM,
Resident Assistant Secretary.

Approved this 31st day of July, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 31, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [463½]

Assignment of Errors of J. P. Duke.

J. P. Duke, as Supervisor of Banks of the State of Washington, and as successor in office to the defendant, Claude P. Hay, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, Jr., as Special Deputy Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, a corporation, respectfully submit and make the following assignment of errors in the above-entitled cause upon which they rely as supporting their appeal from the judgment and decree made and entered in the above-entitled cause on the 2d day of May, 1922, and under which assignment of errors said appellants seek reversal of the decision, judgment and decree of said trial court.

I.

The Court erred in holding that the mortgage referred to in paragraph XXXIV of the decree known

as the Penn Mutual Life Insurance Company mortgage executed by J. E. Chilberg and wife to said Company and subsequently purchased by John P. Duke, as Supervisor of Banks of the State of Washington and assigned to him as such State officer, is not a valid mortgage constituting a first lien upon the real property described in their cross-complaint and described in said Decree and prior to any and all other claims and liens, for the reason that said mortgage is a valid mortgage constituting a lien upon the premises for a period of several years prior to the erection of any building thereon upon which lien claims are asserted in this action. Said mortgage has never been paid and now is legally owned by a state official in the process of liquidating the affairs of the insolvent bank. [464]

II.

The Court erred in refusing to enter a Decree as prayed for in these appellants' cross-complaint foreclosing the so-called Penn Mutual Life Insurance Company mortgage as a lien on the premises of the Scandinavian-American Building Company prior to any and all other liens and claims.

III.

The Court erred in holding that the taking of an assignment of the said Penn Mutual Life Insurance Company mortgage by J. P. Duke, as Supervisor of Banks of the State of Washington, operated as a payment of and to discharge said mortgage and that by reason thereof and for want of equity appellants' cross-complaint should be dismissed, for the reason that the said J. P. Duke was

not an agent or representative of the Bank but was acting in his official capacity as an officer of the State of Washington in the process of liquidating the affairs of said Bank as provided by the laws of said State, and was authorized and directed by the Superior Court of the State of Washington in and for the County of Pierce, in charge of liquidation of said Bank, to purchase said mortgage and take an assignment thereof for the best interests of the creditors of said bank.

IV.

The Court erred in holding the lien claims of McClintic-Marshall Company, Tacoma Millworks Supply Company, E. E. Davis & Company, H. C. Greene, Mullins Bros., Crane Company, Far West Clay Company, Savage-Scofield Company, and the other lien claims and claims allowed in said Decree, or any of them, prior in right to the Penn Mutual mortgage, for the reason that said mortgage was a valid and binding lien upon the premises for a number of years prior to the initiation of any other lien right [465] or claim.

V.

The Court erred in ordering the application of any part of the proceeds of the sale of the premises and property of the Scandinavian-American Building Company to the payment of any liens and claims prior to the application thereof to the payment of the principal and interest of the said Penn Mutual Life Insurance Company mortgage to the said J. P. Duke, as Supervisor of Banks.

VI.

The Court erred in holding that the mortgage for \$600,000.00, known as the G. Wallace Simpson mortgage, and referred to in Paragraph XXXVI of the Decree, executed by the Scandinavian-American Building Company to G. Wallace Simpson, and afterwards assigned to the Scandinavian-American Bank of Tacoma is not a valid mortgage constituting a lien upon the real property and premises of the Building Company and prior to any and all other liens and claims, except the so-called Penn Mutual Life Insurance Company mortgage, for the reason that said mortgage was a valid mortgage of record prior to the initiation of any right or claim of lien on the part of any lien claimants in this action.

VII.

The Court erred in refusing to enter a Decree as prayed for in appellant's cross-complaint foreclosing the so-called Simpson mortgage as a lien on the premises of the Scandinavian-American Building Company, prior to *any all* other liens [466] and claims except the so-called Penn Mutual Life Insurance Company mortgage.

VIII.

The Court erred in holding the lien claims of McClintic-Marshall Company, Tacoma Millworks Supply Company, E. E. Davis & Company, Far West Clay Company, and Savage-Seofield Company and the other claims and lien claims allowed in said Decree, or any of them, prior to the right of the so-called Simpson mortgage, for the reason

that said mortgage was a valid and binding lien upon the premises of the Scandinavian-American Building Company prior to the initiation of any other lien rights or claims other than the so-called Penn Mutual mortgage, and that all of said lien claimants had actual knowledge of the existence of said mortgage prior to the time of delivery of any material or the performance of any labor on the premises of the Scandinavian-American Building Company.

IX.

The Court erred in ordering the application of any part of the proceeds of the sale of the premises and property of the Scandinavian-American Building Company to the payment of any liens and claims prior to the application thereof to the payment of the principal and interest of the said Simpson mortgage, except only the so-called Penn Mutual mortgage.

X.

The Court erred in refusing to enter a Decree as prayed for in these appellants' second cross-complaint establishing a lien upon the real property of the Scandinavian-American Building [467] Company in the nature of a purchase money mortgage which arose out of an agreement by which the Scandinavian-American Building Company agreed to deliver to the Scandinavian-American Bank of Tacoma, bonds of the par value of \$350,000.00, and secured by a second mortgage on the premises involved in this action, for the reason that the title to said lots and premises was transferred by the

Bank to the Building Company without any consideration other than the agreement to deliver the above bond within four months from February 20th, 1920.

XI.

The Court erred in holding any lien claims or other claims prior to the so-called purchase money mortgage other than the Penn-Mutual mortgage.

WHEREFORE the above-named appellants pray that said Decree may be reversed and that said Court be directed to dismiss this action or to enter such Decree as the Court may direct, as equitable herein.

KELLY & MacMAHON,
F. D. OAKLEY,

Attorneys for Supervisor of Banks of the State of
Washington, et al.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 22, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [468]

Citation of J. P. Duke.

UNITED STATES OF AMERICA to McClintic-Marshall Company, a Corporation, Ann Davis, and R. T. Davis, Jr., as Executors of the Estate of R. T. Davis, Deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis,

Copartners Doing Business Under the Name and Style of Tacoma Millwork Supply Co., G. Wallace Simpson, Savage-Scofield Company, a Corporation, Puget Sound Iron & Steel Works, a Corporation, E. E. Davis & Company, a Corporation, St. Paul & Tacoma Lumber Co., a Corporation, Far West Clay Company, a Corporation, Henry Mohr Hardware Company, Inc., a Corporation, Hunt & Mottet, a Corporation, Edward Miller Cornice & Roofing Company, a Corporation, Washington Brick Lime & Sewer Pipe Company, a Corporation, Otis Elevator Company, a Corporation, United States Machine & Engineering Co., a Corporation, Crane Company, a Corporation, Ben Olson Co., a Corporation, H. C. Greene, Doing Business as H. C. Greene Iron Works, Carl Gebbers and Fred S. Haines, Copartners Doing Business Under the Firm Name and Style of Ajax Electric Company, S. O. Matthews and Frank L. Johns, Copartners Doing Business Under the Firm Name and Style of City Lumber Agency, J. D. Mullins, Doing Business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, Copartners Doing Business as P. & G. Lumber Company, Morris Kleiner, Doing Business as Liberty Lumber & Fuel Company, J. A. Soderberg, Doing Business West Coast Monumental Co., Theodore Hedlund, Doing Business as Atlas Paint Co., F. W. Madsen, Gustaf Jonasson. N. A. Hansen, A. J. VanBuskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred

Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, and Robert M. Davis and Frank C. Neal, Copartners Doing Business Under the Firm Name and Style of Davis & Neal, Sherman Wells, Carl J. Geringer, George Geringer, F. R. Schoen, A. W. Aufang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey, and W. E. Morris, Colby Star Manufacturing Company, a Corporation, Tacoma Shipbuilding Company, a Corporation, Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company, a Corporation, Seattle Hardware Company, a Corporation, Frederick Webber, and O. S. Larson, [469] GREETINGS:

YOU ARE HEREBY NOTIFIED that in a certain case in equity in the United States District Court in and for the Western District of Washington, Southern Division, wherein McClintic-Marshall Company, a corporation, is complainant, and J. P. Duke, as Supervisor of Banks of the State of Washington, and as successor in office to the defendant Claude P. Hay, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, Jr.,

as Special Deputy Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, a corporation, et al., are defendants and cross-complainants, said case being numbered 117—E, in which case a decree was entered and rendered by the said Court on the 2d day of May, 1922, an appeal has been allowed J. P. Duke, as Supervisor of Banks of the State of Washington, and as successor in office to the defendant Claude P. Hay, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, Jr., as Special Deputy Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, a corporation, defendants therein, to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, in the State of California, within thirty days from the date of this citation, and there show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS, the Honorable E. E. CUSHMAN, Judge of [470] the United States District Court for the Western District of Washington, this 31st day of July, 1922.

EDWARD E. CUSHMAN,
Judge.

Service of the above and foregoing citation is hereby acknowledged this 10th day of August, 1922.

HAYDEN, LANGHORNE & METZ-
GER,

Attorneys for Complainant.

F. D. OAKLEY,
KELLY & MacMAHON,

Attorneys for Scandinavian-American Building
Company and for Forbes P. Haskell, Its Re-
ceiver.

FITCH & ARNTSON,
R. S. HOLT,
Attorney for Savage-Scofield Company.

JAMES W. REYNOLDS,
Attorney for E. E. Davis & Company.
R. S. HOLT,

Attorney for Hunt & Mottet.

DAVIS & NEAL,
Attorney for Washington Brick, Lime & Sewer
Pipe Company.

A. O. BURMEISTER,
Attorney for United States Machine & Engineering
Co.

FLICK & PAUL,
Attorneys for Tacoma Millwork Supply Com-
pany.

Attorneys for Scandinavian-American Bank of Ta-
coma, Claude P. Hay, Forbes P. Haskell,

Deputy State Bank Commissioner, John P.
Duke, Supervisor of Banking, et al.

BATES & PETERSON,

Attorneys for Puget Sound Iron & Steel Works.

H. S. GRIGGS,

L. R. BONNEVILLE,

Attorneys for St. Paul & Tacoma Lumber Com-
pany.

W. W. KEYES,

Attorney for Henry Mohr Hardware Company.

BOGLE, MERRITT & BOGLE,

Attorney for Otis Elevator Company.

GROSSCUP & MORROW,

Attorney for Colby Star Manufacturing Com-
pany. [471]

LYLE, HENDERSON & CARNA-
HAN,

Attorney for Tacoma Shipbuilding Company.

STILES & LATCHAM,

Attorney for Ben Olson Company & F. H. God-
frey.

E. N. EISENHOWER,

Attorney for Ajax Electric Company.

TEATS, TEATS & TEATS,

Attorney for J. D. Mullins Company.

LOUIS J. MUSCEK,

Attorney for Liberty Lumber & Fuel Company.

Attorney for Atlas Paint Company.

TUCKER & HYLAND,

Attorneys for O. S. Larson.

HERR, BAYLEY & CROSON,

Attorney for Seattle Hardware Company.

CHAS. BEDFORD,

Attorney for N. A. Hansen et al. Included as Defendants in Cross-complaint.

S. F. McANALLY,

Attorney for C. H. Boedecker, Wm. L. Owen, et al.

WALTER S. FULTON,

Attorney for Crane Company.

H. A. P. MYERS,

Attorney for H. C. Greene Iron Works.

BURKEY, O'BRIEN & BURKEY,

Attorney for City Lumber Agency.

GROSSCUP & MORROW,

Attorney for P. & G. Lumber Company.

Attorney for West Coast Monumental Company.

L. R. BONNEVILLE,

Attorney for Davis & Neal.

D. R. HOPPE,

Attorney for Theodore Hedlund.

BAUSMAN, O. B. & E.

Attorney for Frederick Webber.

Copy of the within received this 10th day of Aug.
1922.

HARTMAN & HARTMAN,

Attorney for W. E. Morris.

DE WITT M. EVANS,

Attorney for F. R. Schoen.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern

Division. Jul. 31, 1922. F. M. Harshberger, Clerk.
By Ed M. Lakin, Deputy. [472]

**Notice of Lodgment of Statement of Evidence of
J. P. Duke et al. and Acknowledgment of Service, etc.**

To _____,
Attorneys for _____.

You are hereby notified that on the 29th day of June, 1922, J. P. Duke, as Supervisor of Banks of the State of Washington, one of the defendants and cross-complainants in the above-entitled action lodged with the Clerk of the above-entitled court his proposed statement of the testimony as provided in Equity Rule 75 (be), to be used by him on his appeal to the Circuit Court of Appeals for the Ninth Circuit; and take notice further that on Friday, the 21st day of July, 1922, at 10:00 o'clock A. M., or as soon thereafter as the matter can be heard, the undersigned will apply to the said Court to approve said statement.

F. D. OAKLEY,
KELLY & MacMAHON,

Attorneys for Said J. P. Duke as Said Supervisor of Banks.

We, the undersigned, attorneys for party litigants in the within entitled action hereby acknowledge service of notice of lodgment of statement of evidence on behalf of F. P. Haskell, Jr., Receiver

of the Scandinavian-American Building Company
this 3d day of July, A. D. 1922.

TEATS, TEATS & TEATS,

Attys. for Mullins Bros.

DAVIS & NEAL,

Attys. Washington Brick, Lime & Sewer Pipe
Co.

H. S. GRIGGS,

Atty. for St. Paul & Tac. Lbr. Co.

L. R. BONNEVILLE,

Atty. for Davis & Neal.

GROSSCUP & MORROW,

Attorney for P. & G. Lumber Co. and Colby Star
Iron Wks. [473]

R. S. HOLT,

Atty. for Far West Clay Co.

FITCH & ARNTSON and

R. S. HOLT,

Attys. for Savage-Scofield Co.

BURKEY, O'BRIEN & BURKEY,

Attys. for City Lbr. Agency.

E. N. EISENHOWER,

Atty. for Ajax Electric Co.

BATES & PETERSON,

Attys. for Puget Sound Iron & Steel Wks.

W. W. KEYES,

Atty. for Hunt & Mottet and Henry Mohr.

HAYDEN, LANGHORNE & METZ-
GER,

Attorneys for Complainant.

STILES & LATCHAM,

Attys. for Ben Olson Co. and F. H. Godfrey.

LUND & LUND,

DeWITT M. EVANS,

Attys. for F. R. Schoen.

CHAS. BEDFORD,

Atty. for Hansen et al.

LOUIS J. MUSCEK,

Atty. for Liberty Lumber Fuel Co.

A. O. BURMEISTER,

Atty. for U. S. Mach. & Eng. Co.

LYLE, HENDERSON & CARNAHAN,

Atty. for Tacoma Shipbuilding Co.

S. F. McANALLY,

Atty. for Chas. Owen & Boedecker.

We, the undersigned, attorneys appearing for party litigants in the within entitled action hereby acknowledge service of notice of lodgment of statement of evidence on behalf of F. P. Haskell, Jr., Receiver of the Scandinavian-American Building Company this 8th day of July, A. D. 1922.

J. W. REYNOLDS,

Attorney for E. E. Davis & Co.

HARTMAN & HARTMAN,

Attorneys for Morris, et al.

HERR, BAYLEY & CROSON,

Attys. for Seattle Hardware Co.

H. A. P. MYERS,

Atty. for H. C. Green etc., Bausman, O. B. & E.
for Webber.

WALTER S. FULTON,

Atty. for Crane Co.

FLICK & PAUL,

Attys. for Tacoma M. & S. Co.

D. R. HOPPE,

Atty. for Theodore Hedlund. [474]

TUCKER & HYLAND,

Attys. for O. S. Larson.

W. M. HARVEY,

R. J. M.,

Atty. for Edward Miller Cornice & Roofing Co.

BOGLE, MERRITT & BOGLE,

Attorneys for Otis Elevator Co.

F. D. OAKLEY and

KELLY & MacMAHON,

Attorneys for F. P. Haskell, Receiver, etc.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [475]

Petition for Appeal of McClintic-Marshall Company.

The above-named plaintiff, McClintic-Marshall Company, and the following defendants, or intervenors, to wit, E. E. Davis & Company, a corporation, and Far West Clay Company, a corporation, conceiving themselves aggrieved by the decree made and entered on the 2d day of May, 1922, in the above-entitled cause, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the several reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal

may be allowed and that citation be issued as provided by law, and that the statement of the evidence heretofore certified by this court in this cause in connection with the appeals of Forbes P. Haskell as Receiver of Scandinavian-American Building Company, a corporation, R. T. Davis and others doing business as Tacoma Millwork Supply Company, Washington Brick, Lime & Sewer Pipe Company, and Ben Olson Company, and John P. Duke as Supervisor of Banks of the State of Washington, may be allowed and certified as the statement of the evidence under this appeal, and that a transcript of the record, proceedings and paper [476] upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

HAYDEN, LANGHORNE & METZGER,

Attorneys for McClintic-Marshall Co.

PETERS & POWELL,

JAMES W. REYNOLDS,

Attorneys for E. E. Davis & Company.

R. S. HOLT,

Attorneys for Far West Clay Co.

The foregoing claim of appeal is hereby allowed, upon giving bond, as required by law, for the sum of \$500.00.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 26, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [477]

Bond on Appeal of McClintic-Marshall Company.

KNOW ALL MEN BY THESE PRESENTS: That we, McClintic-Marshall Company, a Pennsylvania corporation, E. E. Davis & Company, a Washington corporation, and Far West Clay Company, a Washington corporation, as principal, and the National Surety Company of New York, a corporation organized and existing under and by virtue of the laws of the state of New York, and duly authorized to transact the business of surety in the state of Washington, as surety, are held and firmly bound unto Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant, and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company, in the sum of Five Hundred and no/100 Dollars (\$500.00), lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, by these presents. [478]

Sealed with our seals and dated this —— day of October, 1922.

WHEREAS the above-named McClintic-Marshall Company, E. E. Davis & Company, and Far West

Clay Company, have prosecuted a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the district court for the Western District of Washington, in the above-entitled cause:

NOW, THEREFORE, the condition of this obligation is such that if the above-named McClintic-Marshall Company, E. E. Davis & Company, and Far West Clay Company shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

McCLINTIC-MARSHALL COMPANY.

By HAYDEN, LANGHORNE & METZGER,
Its Attorneys.

E. E. DAVIS & COMPANY.

By PETERS & POWELL,
Its Attorneys.

FAR WEST CLAY COMPANY.

By R. S. HOLT,
Its Attorney.

NATIONAL SURETY COMPANY.

[Corporate Seal] By W. B. GILHAM,
Its Attorney in Fact.

The foregoing bond approved this 31st day of Oct. 1922.

EDWARD E. CUSHMAN,
Judge. [479]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 30, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [480]

Assignment of Errors of McClintic-Marshall Company.

McClintic-Marshall Company, a corporation, E. E. Davis & Company, a corporation, and Far West Clay Company, a corporation, respectfully submit and hereby make the following assignment of errors in the above-entitled cause, upon which they rely as supporting their appeal from the judgment and decree made and entered in the above-entitled cause on the 2d day of May, 1922, and under which assignment of errors said appellants seek reversal of the decision, judgment and decree of the trial Court.

I.

The Court erred in holding that the defendants Ann Davis and R. T. Davis, Jr., as executors of the estate of R. T. Davis, deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant, and Ann Davis, copartners doing business under the name and style of Tacoma Millwork Supply Company, have a valid and subsisting materialman's lien upon the real estate and premises described in paragraph 3 of said decree, or any part thereof, for the reason that said parties by their original and amended complaint in intervention and by their other pleadings and by the evidence submitted in [481] support thereof elected to and did affirm the contract entered into between them and the Scandinavian-American Building Company and did thereby affirm each and every part of said contract, including the 14th

paragraph thereof, by the terms of which they expressly waived any and all right of lien whatsoever.

II.

The Court erred in holding that said parties doing business under the name and style of Tacoma Millwork Supply Company were entitled to any lien whatsoever against the real estate or premises described in paragraph 3 of said decree, or any part thereof, upon the ground and for the reason that said parties by their pleadings, admissions and evidence elected to and did affirm in each and every part thereof the contracts theretofore made by them with the Scandinavian-American Building Company, and in particular did affirm the provisions of paragraph 14 of said contract, wherein and whereby they waived all right to any claim of lien whatsoever.

III.

The Court erred in allowing said parties doing business as Tacoma Millwork Supply Company a materialman's lien upon the real estate and premises described in paragraph 3 of the decree, for the reasons that the said claim of lien was based upon a series of contracts constituting a single transaction and one general undertaking, whereunder said parties became and were contractors for the furnishing and installing in place of certain materials, and that if entitled to any lien at all said lien should only be of the rank of a contractor's lien.

WHEREFORE these appellants pray that said decree may be reversed and that said District Court

for the Western [482] District of Washington, be ordered to enter a decree reversing the decision of the lower Court in said cause in so far as it establishes and decrees any lien in favor of R. T. Davis, Jr., and others, doing business as the Tacoma Millwork Supply Company.

HAYDEN, LANGHORNE & METZGER,
Attorneys for McClintic-Marshall Company.

PETERS & POWELL,
JAMES W. REYNOLDS,
Attorneys for E. E. Davis & Company.

R. S. HOLT,
Attorneys for Far West Clay Company.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 26, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [483]

**Proposed Statement of Evidence on Appeal of
McClintic-Marshall Company et al.**

The appellant, McClintic-Marshall Company, E. E. Davis & Company and Far West Clay Company, hereby propose as the statement of evidence under Equity Rule 75, to be used on their appeal from the decree rendered in this court and cause on May 2, 1922, the statement of evidence heretofore proposed by R. T. Davis, Jr., and others, doing business as Tacoma Millwork Supply Company, and incorporated in the general statement of evidence allowed and certified by this Court under date of

October 9, 1922, the particular portion of said general statement hereby proposed and relied upon being found on pages 11 to 111, inclusive, and these appellants hereby pray that this Court may enter a show cause order returnable on a day certain, requiring the parties to this case to show cause, if any they have, why the statement of evidence heretofore certified and allowed should not be further certified and allowed as the statement of evidence upon this appeal.

HAYDEN, LANGHORNE & METZGER,
Attorneys for McClintic-Marshall Co.
PETERS & POWELL and
JAMES W. REYNOLDS,
Attorneys for E. E. Davis & Co.
R. S. HOLT,
Attorneys for Far West Clay Co.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 26, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [484]

**Order to Show Cause Why Statement of Evidence
Should not be Certified as Evidence on Appeal
of McClintic-Marshall Company, E. E. Davis
& Co., and Far West Clay Co.**

WHEREAS an appeal has heretofore been allowed McClintic-Marshall Company, a corporation, complainant herein, E. E. Davis & Company, a corporation, and Far West Clay Company, a corpora-

tion, defendant herein, and said appellants by their petition for the allowance of their appeal asked that the statement of evidence heretofore certified by this Court as the statement of evidence upon the appeals heretofore taken being certified and allowed as the statement of evidence in connection with this appeal, and the court being duly advised in all the premises:

IT IS THEREFORE ORDERED that all parties to this cause appear before this court at 10 A. M., on Monday, the 30th day of October, 1922, to show cause if any they have why the statement of evidence heretofore certified by this Court should not be certified and allowed as the statement of evidence upon the appeal of the said McClintic-Marshall Company, E. E. Davis & Company, and Far West Clay Company.

IT IS FURTHER ORDERED that a copy of this order be served upon the several parties to this action at least three (3) days before the day hereby fixed for the hearing hereof.

Done in open court this 26th day of October, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 26, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [485]

**Stipulation Re Statement of Evidence on Appeal of
McClintic-Marshall Co. et al.**

WHEREAS, the petition of McClintic-Marshall Company, E. E. Davis & Company and Far West Clay Company for an appeal to the Circuit Court of Appeals for the Ninth Circuit from the decree rendered by the above-entitled Court in the above-entitled cause on May 2, 1922, was allowed on October 26, 1922, and on said date an order to show cause why the statement of evidence heretofore allowed and certified by this court on October 9, 1922, should not be certified and allowed as the statement of evidence under Equity Rule 75, upon said appeal of McClintic-Marshall Company and others, was entered, returnable October 30, 1922; and

WHEREAS all the evidence in the above-entitled cause in any way relating to the said appeal of McClintic-Marshall Company, E. E. Davis & Company and Far West Clay Company, is already set forth and embodied in the statement of evidence certified under date of October 9, 1922, and any further or additional statement would be a duplication of the statement heretofore certified and allowed:

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the several parties to this action signatories hereof, that the said statement of evidence certified and allowed as such, under Equity Rule 75, by the above-entitled court on October 9, 1922, shall be and shall be deemed to be the statement of evidence for all purposes in connection with the appeal of McClintic-Marshall Com-

pany, E. E. Davis & Company and Far West Clay Company, and that this stipulation shall evidence the consent of the parties hereto to the entry of an order certifying and allowing the statement of [486] evidence heretofore certified and allowed under date of October 9, 1922, as the statement of evidence under Equity Rule 75 upon the appeal of McClintic-Marshall Company, E. E. Davis & Company and Far West Clay Company.

Dated this 28th day of October, 1922.

GUY E. KELLY,
THOS. MacMAHON and
F. D. OAKLEY,

As Attorneys for Forbes P. Haskell as Receiver of
S. A. Building Co.

KELLY & MacMAHON, and
F. D. OAKLEY,

As Attorneys for John P. Duke, State Supervisor
of Banks of the State of Washington, and
Forbes P. Haskell as Deputy State Bank Su-
pervisor in Charge of S. A. Bank of Tacoma.

EDWIN H. FLICK,

Attorneys for R. T. Davis, Jr., et al., Doing Business
as Tacoma Millwork Supply Company.

CHARLES P. LUND, and

DAVIS & NEAL,

Attorneys for Washington Brick, Lime & Sewer
Pipe Company.

STILES & LATCHAM,

Attorneys for Ben Olson Company and F. H. God-
frey.

PETERS & POWELL, and

JAS. W. REYNOLDS,

Attorneys for E. E. Davis & Company.

R. S. HOLT,

Attorney for Far West Clay Co.

HAYDEN, LANGHORNE & METZGER,

Attorney for McClintic-Marshall Co.

H. S. GRIGGS and

L. R. BONNEVILLE,

Attorneys for St. Paul & Tacoma Lbr. Co.

L. R. BONNEVILLE,

Attorney for Davis & Neal.

TEATS, TEATS & TEATS,

Attorney for J. D. Mullins.

LOUIS J. MUSCEK,

Attorney for Morris Kleiner.

DeWITT M. EVANS,

Attorney for F. R. Schoen.

CHAS. BEDFORD,

Attorney for N. A. Hansen, et al.

GROSSCUP & MORROW,

Attorneys for P. & G. Lumber Co. and Colby Star
Mfg. Co.

FITCH & ARNTSON,

Attys. for Savage-Scofield Co.

BURKEY, O'BRIEN & BURKEY,

Attys. City Lumber Agency.

BATES & PETERSON,

Attys. for P. S. I. & Steel Wks.

E. N. EISENHOWER,

Atty. for Carl Gebbers and Fred Haines.

H. A. P. MYERS,

Atty. for H. C. Greene, etc.

HERR, BAYLEY & CROSON,

Attorneys for Seattle Hardware Co.

TUCKER & HYLAND,

Attys. for O. S. Larson. [487]

W. W. KEYES,

Attorney for Henry Mohr and Hunt & Mottet.

S. F. McANALLY,

Atty. for C. H. Boedecker and William L. Owens.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 30, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [488]

**Order Settling and Allowing Statement of Evidence
on Appeal of McClintic-Marshall Company.**

This cause coming on regularly to be heard at the time fixed for the parties herein to show cause why the statement of evidence heretofore and under date of October 9, 1922, certified and allowed as the statement of evidence upon the appeals then taken in this case, should not be further certified and allowed as the statement of evidence upon the appeal of McClintic-Marshall Company, E. E. Davis & Company, and Far West Clay Company, and it appearing to the Court that due service of said order has been made, and that it has been stipulated by all the parties to this action that the aforesaid statement of evidence heretofore lodged with the Clerk of this court and

certified under date of October 9, 1922, might also be certified and allowed as the statement of evidence upon the said appeal of McClintic-Marshall Company, et al., and the court being otherwise duly advised in the premises,

DOTH HEREBY CERTIFY that the matters and proceedings contained in the statement of evidence heretofore certified and allowed under date of October 9, 1922, are matters and proceedings occurring in the above-entitled cause, and the same are hereby made a part of the record herein, and that [489] the same contains all the exhibits and all the material facts and proceedings heretofore occurring and the evidence received in said cause in any material or pertinent to the appeal of the McClintic-Marshall Company, E. E. Davis & Company and Far West Clay Company, and do hereby further certify that said statement of evidence contains all the material evidence and testimony adduced upon the trial of said cause reduced to narrative form, except where for the sake of clarity testimony is reproduced *verbatim* which is material to or which was received upon the trial of said cause in connection with the matters and things involved in said appeal of McClintic-Marshall Company, et al., and

IT IS THEREFORE HEREBY ORDERED that said statement of evidence heretofore certified and allowed under date of October 9, 1922, be and the same is hereby certified and allowed as the statement of evidence required by equity rule No. 75 upon the appeal of McClintic-Marshall Company,

E. E. Davis & Company and Far West Clay Company.

Done in open court this 30th day of October, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 30, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [490]

Citation of McClintic-Marshall Company.

UNITED STATES OF AMERICA to Ann Davis and R. T. Davis, Jr., as Executors of the Estate of R. T. Davis, Deceased, R. T. Davis, Jr., Lloyd Davis, Harry L. Davis, George L. Davis, Maude A. Davis, Marie A. Davis, Ruth G. Davis, Hattie Davis Tennant and Ann Davis, Copartners Doing Business Under the Name and Style of Tacoma Millwork Supply Co., G. Wallace Simpson, Savage-Scofield Company, a Corporation, Puget Sound Iron & Steel Works, a Corporation, St. Paul & Tacoma Lumber Co., a Corporation, Henry Mohr Hardware Company, Inc., a Corporation, Hunt & Mottet, a Corporation, Edward Miller Cornice & Roofing Company, a Corporation, Washington Brick, Lime & Sewer Pipe Company, a Corporation, Otis Elevator Company, a Corporation, United States Machine & Engineering Co., a Corporation, Crane Company, a Corpo-

ration, Ben Olson Co., a Corporation, H. C. Greene, Doing Business as H. C. Greene Iron Works, Carl Gebbers and Fred S. Haines, Copartners Doing Business Under the Firm Name and Style of Ajax Electric Company, S. O. Matthews and Frank L. Johns, Copartners Doing Business Under the Firm Name and Style of City Lumber Agency, J. D. Mullins, Doing Business as J. D. Mullins Bros., S. J. Pritchard and C. H. Graves, Copartners Doing Business as P. & G. Lumber Company, Morris Kleiner, Doing Business as Liberty Lumber & Fuel Company, J. A. Soderberg, Doing Business as West Coast Monumental Co., Theodore Hedlund, Doing Business as Atlas Paint Co., F. W. Madsen, Gustaf Jonasson, N. A. Hansen, A. J. Van Buskirk, C. W. Crouse, F. L. Swain, D. A. Trolson, Fred Gustafson, E. Scheibal, Paul Scheibal, F. J. Kazda, W. Donnellan, P. Hagstrom, Arthur Purvis, Roy Farnsworth, C. B. Dustin, L. J. Pettifer, Charles Bond, L. H. Broten, W. Canaday, L. R. Lilly, F. McNair, Dave Shields, Ed. Lindberg, Joe Tikalsky, F. Mente, C. Gustafson, George Larson, F. Marcellino, M. Swanson, William Griswold, C. E. Olson, C. I. Hill, Emil Johnson, C. Peterson, Earl Whitford, F. A. Fetterly, Thomas S. Short, and Robert M. Davis and Frank C. Neal, Copartners Doing Business Under the Firm Name and Style of Davis & Neal, Sherman Wells, Carl J. Gerringer, George Gerringer, F. R. Schoen, A. W.

Anfang, C. H. Boedecker, William L. Owen, F. N. Bergen, F. H. Godfrey, and W. E. Morris, Colby Star Manufacturing Company, a Corporation, Tacoma Shipbuilding Company, a Corporation, Scandinavian-American Building Company, a Corporation, Forbes B. Haskell, as Receiver of Scandinavian-American Building Company, a Corporation, Scandinavian-American Bank of Tacoma, a Corporation, P. Claude Hay, as State Bank Commissioner for the State of Washington, and John P. Duke, His Successor in Office [491] as Supervisor of Banks of the State of Washington, Forbes P. Haskell, as Deputy State Bank Commissioner for the State of Washington, Seattle Hardware Company, a Corporation, Frederick Webber, and O. S. Larson, GREETINGS:

YOU ARE HEREBY NOTIFIED that in a certain case in equity in the United States District Court in and for the Western District of Washington, Southern Division, wherein McClintic-Marshall Company, a Corporation, is complainant, and Forbes P. Haskell, as Receiver of Scandinavian-American Building Company, a Corporation, et al., are defendants and cross-complainants, said case being numbered 117-E, in which case a Decree was entered and rendered by the said Court on the 2d day of May, 1922, an appeal has been allowed McClintic-Marshall Company, a corporation, complainant herein and E. E. Davis & Company, a corporation, and Far West Clay Company, a corpora-

tion, defendants therein, to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the date of this citation, and there show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS, the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court for the Western District of Washington, this 26th day of October, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 26, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [492]

Acknowledgment of Service of Citation and Order to Show Cause of McClintic-Marshall Company.

We hereby acknowledge due service upon us of the citation upon the appeal of McClintic-Marshall Company, a corporation, E. E. Davis & Company, a corporation, and Far West Company, a corporation, and of the order to show cause as to the statement of evidence upon such appeal dated October

26, 1922, by receipt of true copies of said citation and order this 26th day of October, 1922.

GUY E. KELLY, and
THOS. MacMAHON and
F. D. OAKLEY,

As Attorneys for Forbes P. Haskell, as Receiver
of S. A. Building Co.

KELLY & MacMAHON and
F. D. OAKLEY,

As Attorneys for John P. Duke, State Supervisor
of Banks of the State of Washington, and
Forbes P. Haskell as Deputy State Bank Su-
pervisor in Charge of S. A. Bank of Tacoma.

EDWIN H. FLICK,

Attorneys for R. T. Davis, Jr., et al., Doing Busi-
ness as Tacoma Millwork Supply Company.

CHARLES P. LUND and
DAVIS & NEAL,

Attorneys for Washington Brick, Lime & Sewer
Pipe Company.

STILES & LATCHAM,

Attorneys for Ben Olson Company, and F. H. God-
frey. [493]

FITCH & ARNTSON,

Attorneys for Savage-Scofield Co.

BATES & PETERSON,

Attorneys for Puget Sound Iron & Steel Works.

H. S. GRIGGS,

L. R. BONNEVILLE,

Attorneys for St. Paul & Tacoma Lumber Co.

W. W. KEYES,

Attorneys for Henry Mohr Hardware Co., Inc.,
and Hunt & Mottet.

Mr. Harvey, being out of town, I left true copies
of said citation and order with Mr. Talbot, in Mr.
Harvey's office Oct. 28, 1922. Served by

GORDON MIFFLIN,

Attorney for Edward Miller Cornice & Roofing
Co.

BOGLE, MERRITT & BOGLE,

Attorneys for Otis Elevator Co.

GROSSCUP & MORROW,

Attorneys for Colby-Star Manufacturing Company
and P. and G. Lumber Co.

WALTER S. FULTON,

Attorney for Crane Company.

H. A. P. MYERS,

Attorney for H. C. Greene.

E. N. EISENHOWER,

Attorney for Carl Gebbers and Fred S. Haines.

BURKEY, O'BRIEN & BURKEY,

Attorneys for C. O. Matthews and Frank L.
Johns.

TEATS, TEATS & TEATS,

Attorneys for J. D. Mullins.

LOUIS J. MUSCIK,

Attorney for Morris Kleiner. [494]

CHAS. BEDFORD,

Attorneys for N. A. Hansen et al.

L. R. BONNEVILLE,

Attorney for Robert M. Davis and Frank C. Neal.

DeWITT M. EVANS,

Attorney for F. R. Schoen.

S. F. McANALLY,

Attorney for C. H. Boedecker and William L. Owen.

Copy of the within received this 28 day of Oct., 1922.

HARTMAN & HARTMAN,

Attorneys for W. E. Morris.

HERR, BAYLEY & CROSON,

Attorneys for Seattle Hardware Co.

BAUSMAN, OLDHAM, B. & E.,

Attorneys for Frederick Webber and Sherman Wells.

TUCKER & HYLAND,

Attorneys for O. S. Larson.

D. R. HOPPE,

Attorney for Theo. Hedlund.

S. N. LOCKERBY,

Attorney for J. A. Soderberg.

LYLE, HENDERSON and CARNAHAN,

Attorneys for Tacoma Shipbuilding Co.

A. O. BURMEISTER,

Attorney for U. S. Machine & Engineering Co.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 30, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [495]

Order Enlarging Time to and Including June 12, 1922, to File Record and Docket Cause (Tacoma Millwork Supply Company).

BE IT REMEMBERED, that this matter came on duly on the application of appellants doing business under the firm name and style of Tacoma Millwork Supply Company, for an order granting additional time over that limited by rule of court or statute for the preparation and filing of the record on appeal in the foregoing cause; and it appearing to this Court that the said appellants have this day duly given notice of appeal in open court and filed their petition for appeal, which has been duly allowed, together with their assignments of error; and it further appearing that owing to the number of parties interested in this cause, the size of the record and necessity of segregation of evidence from the statement of facts therein, that it will require considerable time for the preparation of such record,—

NOW, THEREFORE, it is hereby ORDERED AND ADJUDGED that said appellants have and they are hereby granted to and including the 12th day of June for the preparation and filing of their record on appeal in this cause.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 3, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [496]

At a regular session of the United States District Court for the Western District of Washington, Southern Division, held at Tacoma on the 21st day of July, 1922, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had, were the following truly taken and correctly copied from the journal of said court, to wit:

No. 117-E.

McCLINTIC-MARSHALL CO.

vs.

SCANDINAVIAN-AMERICAN BUILDING CO.
et al.

Order Enlarging Time to and Including July 28, 1922, to File Record and Docket Cause (Tacoma Millwork Supply Company).

Now, on this 21st day of July, 1922, F. D. Oakley, Robt. Davis, T. L. Stiles, Thos. MacMahon, F. D. Metzger, present as counsel for litigants, the Tacoma Millwork and Supply Company, are granted an extension of time to Friday, July 28, for settlement of statement and to file record.

Plaintiff's objection to statement of Haskell, receiver herein, is overruled.

The Ben Olson statement and proposed amendments is agreed upon. Also Washington B. L. & S. P. Co. statement and proposed amendments is agreed upon. Further hearing on bill of exceptions is continued to 10 A. M. July 22, 1922. [497]

Order Continuing Cause.

This cause having been regularly called for hearing for the purpose of considering the approval by the Court of the statement of evidence to be made a part of the record on the appeal of said cause to the Circuit Court of Appeals for the Ninth Circuit, and it appearing to the Court that the matter cannot be heard and settled and approved during the present term, and upon motion of Kelly & MacMahon, attorneys for F. P. Haskell, Receiver of the Scandinavian-American Building Company, a corporation, and also as attorneys for J. P. Duke, as Supervisor of Banks for the State of Washington, and upon motion of Flick & Paul, attorneys for Tacoma Millwork Supply Company, one of the defendants above named,—

IT IS HEREBY ORDERED, that the matter of approving the statement of evidence heretofore lodged by the Tacoma Millwork Supply Company, J. P. Duke, as Supervisor of Banks of the State of Washington, and F. P. Haskell, as Receiver of the Scandinavian-American Building Company, a corporation, and Ben Olson Company, and the entire matter of preparing and approving the Statement of Evidence as provided under Equity Rule 75 (b) and all other matters referring to an appeal of the above-entitled action to the Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby continued and carried over to the next term of this court, for further consideration and action.

Done in open court June 30, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 30, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [498]

Order Extending Time to and Including September 28, 1922, to File Record and Docket Cause (Forbes P. Haskell).

For satisfactory reasons appearing to the Court the time for filing record on behalf of Forbes P. Haskell, as Receiver of Scandinavian-American Building Company, a corporation, in this cause in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal sued out, is hereby extended to and including the 28th day of September, 1922.

Dated August 30th, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 31, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [499]

Order Extending Time to and Including September 28, 1922, to File Record and Docket Cause (J. P. Duke).

For satisfactory reasons appearing to the Court the time for filing record on behalf of J. P. Duke, as Supervisor of Banks of the State of Washington, and as successor in office to the defendants Claude P. Hay, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, Jr., as Special Deputy Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, a corporation, in this cause in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the appeal sued out, is hereby extended to and including the 28th day of September, 1922.

Dated August 30th, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 30, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [500]

Order Extending Time to and Including October 16, 1922, to File Record and Docket Cause (Ben Olson Company et al).

This matter coming on for hearing on this 6th day of September, 1922, on the application of Ben Olson

Company, a corporation, the Tacoma Millwork & Supply Company, a corporation, the Washington Brick, Lime & Sewer Pipe Company, a corporation, Forbes P. Haskell, as Receiver of the Scandinavian-American Building Company, and J. P. Duke, as Supervisor of Banks of the State of Washington, and as successor in office to the defendants Claude P. Hay, as State Bank Commissioner of the State of Washington, Forbes P. Haskell, Jr., as Special Deputy Supervisor of Banks of the State of Washington, and Scandinavian-American Bank of Tacoma, a corporation, appellants herein, for an order extending the time for the preparation and filing of the transcripts and records on appeal, pursuant to the appeals sued out herein by the various appellants to Monday, October 16, 1922, for the reason that the Court has been unable to sooner settle the various statements of evidence, and is about to be absent from the State, and for other satisfactory reasons; Now, therefore,—

IT IS HEREBY ORDERED, That the time for the preparation and filing of the transcripts and records on appeal on behalf of the various appellants named herein, in the Circuit Court of [501]

Appeals of the Ninth Circuit of the United States, be enlarged and extended to and including Monday, the 16th day of October, 1922.

Done in open court this 6th day of September, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Sept. 6, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [502]

Order Fixing Date of Hearing.

For satisfactory reasons appearing to the Court that the proposed statements of the evidence heretofore lodged in the office of the Clerk of the above-entitled Court and the amendments proposed thereto cannot be approved and settled by the Court prior to Oct. 9th, 1922,—

IT IS THEREFORE ORDERED that the said statements and all of the objections and amendments proposed thereto shall be brought on for hearing before the undersigned Judge, in the above-entitled court in the Federal Building, Tacoma, Washington, on October 9th, 1922, at 10 o'clock A. M., at which time the entire matter of approving the statement of the evidence will be considered and approved as directed by the Court.

Done in open court, September 6th, 1922.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the U. S. District Court, Western District of Washington, Southern Division. Sept. 6, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [503]

We, the undersigned hereby acknowledge service of the above and foregoing order, together with copy of same dated this 3d day of October, 1922.

HAYDEN, LANGHORNE & METZGER,
Attorneys for Complainant.

FLICK & PAUL,
EDWIN H. FLICK,
Attorneys for Tacoma Millwork Supply Co. [503]
KELLY & MacMAHON,
Attorneys for Scandinavian-American Building
Company and for Forbes P. Haskell, its Re-
ceiver.

FITCH & ARNTSON,
Attorney for Savage-Scofield Company.

J. W. REYNOLDS,
Attorney for E. E. Davis & Company.

R. S. HOLT,
Attorney for Far West Clay Company.

W. W. KEYES,
Attorney for Hunt & Mottet.

DAVIS & NEAL,
CHAS. P. LUND,
Attorneys for Washington Brick, Lime & Sewer
Pipe Co.

A. O. BURMEISTER,
Attorney for United States Machine Engineering
Co.

LYLE, HENDERSON & CARNAHAN,
Attorney for Tacoma Shipbuilding Company.
STILES & LATCHAM,
Attorney for Ben Olson Company & F. H. Godfrey.

E. N. EISENHOWER,

Attorney for Ajax Electric Company.

TEATS, TEATS & TEATS,

Attorney for J. D. Mullins Bros.

LOUIS J. MUSCEK,

Attorney for Liberty Lumber & Fuel Company.

Attorney for Atlas Paint Company.

TUCKER & HYLAND,

Attorney for O. S. Larson.

KELLY & MacMAHON and

F. D. OAKLEY,

Attorneys for Scandinavian-American Bank of Tacoma, Claude P. Hay, Forbes P. Haskell, Deputy State Bank Comm., John P. Duke, Supervisor of Banking et al.

BATES & PETERSON,

Attorneys for Puget Sound Iron & Steel Works.

HERBERT S. GRIGGS,

Attorney for St. Paul & Tacoma Lumber Company.

W. W. KEYES,

Attorney for Henry Mohr Hardware Company.

WALTER M. HARVEY,

Attorney for Edward Miller Cornice & Roofing Company.

BOGLE, MERRITT & BOGLE,

Attorney for Otis Elevator Company.

GROSSCUP & MORROW,

Attorney for Colby Star Manufacturing Company.

WALTER S. FULTON,

By J. W. T.,

Attorney for Crane Company.

H. A. P. MYERS,
Attorney for H. C. Greene Iron Works.
BURKEY, O'BRIEN & BURKEY,
Attorney for City Lumber Agency.
GROSSCUP & MORROW,
Attorney for P. & G. Lumber Company.

Attorney for Far West Coast Monumental Co.
L. R. BONNEVILLE,

Attorney for Davis & Neal.

D. R. HOPPE,
Attorney for Theodore Hedlund. [504]

HERR, BAYLEY & CROSON,
per D. C.,

Attorney for Seattle Hardware Company.

CHAS. BEDFORD (LC),
Attorney for N. A. Hansen et al., All Included as
Defendants in Cross-complaint.

S. F. McANALLY,
Attorney for C. H. Boedecker, Wm. L. Owen et al.
BAUSMAN, OLDHAM, BULLITT &
EGGERMAN,

Attorneys for Frederick Webber, G. Wallace Simpson.

Received this 4th day of Oct. 1922.

HARTMAN & HARTMAN,
Attorneys for W. E. Morris.

DEWITT M. EVANS,
Attorney for F. R. Schoen.

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Southern

Division. Oct. 5, 1922. F. M. Harshberger,
Clerk. By Ed M. Lakin, Deputy. [505]

**Statement of Testimony Lodged Pursuant to
Equity Rule 75 (b) as Amended.**

The following is the condensed statement in narrative form of the testimony introduced upon the trial of the above-entitled cause made in pursuance of Equity Rule 75 (b) amending and correcting statements of testimony heretofore lodged in the clerk's office for the examination of plaintiff and the other defendants herein as provided by said rule, by J. P. Duke, as Supervisor of Banks of the State of Washington, F. P. Haskell, Jr., as Receiver of the Scandinavian-American Building Company, a corporation, Tacoma Millwork Supply Company, Ben Olson Company, a corporation, and Washington Brick, Lime and Sewer Pipe Company, a corporation, all in conformity to objections made to said original statements of testimony as settled under the direction of the Court. [506]

At the beginning of the case, and before the introduction of any evidence therein, the following occurred:

Mr. OAKLEY.—Before the first lien claim is started to be proved the Receiver wishes to make this objection to the introduction of any testimony that has to do with the lien foreclosure suit. We object for the reason that the property of the Scandinavian American Building Company is now in the hands of this Court through the appointment

of a receiver, and a lien foreclosure suit cannot be maintained looking toward the sale of the premises while the Court itself is administering the estate that has been held in the State of Washington and held in the United States Supreme Court as late as 241 U. S. page 587, in *Bacon vs. Standard* 60 Law Ed. 1191. . . . I want to show that the point has been raised properly before the Court and I am objecting to the proof of contractors and anything looking to the foreclosure of the liens.

The COURT.—It will be so considered.

Prior to the introduction of any testimony on behalf of the complainants, McClintic Marshall Company, the following occurred:

Mr. OAKLEY.— . . . The Receiver objects to the introduction of any testimony on the McClintic-Marshall claim for the reason that the contract provides that any controversies arising out of the contract should be submitted to arbitration, which was not done, and therefore bars the action. This was passed upon by the Court and I now renew the objection.

The COURT.—The objection overruled, exception allowed. [507]

Testimony of Earl J. Patterson, for McClintic-Marshall Company.

EARL J. PATTERSON, a witness called on behalf of McClintic-Marshall Co., testified as follows:

I am the assistant treasurer of the McClintic-Marshall Company; the McClintic Marshall Com-

(Testimony of Earl J. Patterson.)

pany shipped steel to the Scandinavian-American Building Company as follows:

May, 1920, 82,357 pounds.

June, 1920, 60,296 pounds.

July, 1920, 6,990 pounds.

August, 1920, 1,781,514 pounds.

September, 1920, 2,091,354 pounds.

October, 1920, 442,531 pounds.

Exhibit No. 7.

Letter from Larson to McClintic-Marshall Company, dated June 16, 1920.

“This morning we received the following telegram: Have shipped only girders to date. Traffic conditions and shortage of cars have forced mills to practically suspend rolling mill for past two weeks. The outlook more promising at present time. Hope to receive material for lower floors your building about July 1st and to make shipments in July. Shipment of entire building by first of September. It is impossible to make definite promise until mills resume operations.”

In our former letter to you we pointed out that our steel contract was awarded to your company under representations that the necessary steel for the entire building was to be taken out of the stock in five different yards, as we remember it, and when I was in the East the last time, being with your [508] Philadelphia representative about April 5th, I was assured that the first shipment of steel would go forward not later than the 10th

of April. Now it turns out that the rolling material has to be secured from the mills and that the steel was not in stock at all. I wish to point out again that we have been ready to erect this steel for the past six weeks and that the delay is costing us \$5,000 per month in interest and carrying charges on the building.

Exhibit No. 12.

Letter from Larson to H. H. McClintic, dated July 20th, 1920.

“We have previously pointed out to you that the steel order was awarded to your company from among several competitors on representation of your Philadelphia representatives that most of this steel would be taken out of stock in five different yards. It now turns out that you did not have the steel at all at the time this representation was made. . . . If this material can be had in the country, it seems to me that it is up to your people to buy it wherever you can get it and get it out here immediately in order to save us the added carrying charges which are accruing every day.”

Exhibit No. 104.

Letter from McClintic-Marshall Company to O. S. Larson, dated June 24, 1920.

“Our proposition for this work contemplated taking considerable material from stock and we have done so wherever possible.” [509]

Exhibit No. 117.

Frederick Webber to McClintic-Marshall Company. Letter dated May 1, 1920.

“You seem to be laboring under a wrong impression in regard to our steel work for the Scandinavian-American Building, Tacoma, Washington, and I am astonished to find such an excuse this morning, that you are waiting for the steel for your grillage and Mr. Chudduck informed me before he left that this was all in the shop. Our arrangement with Mr. Chudduck was as per our specifications, that four stories of the material was to be bought in the open market for immediate delivery. And he informed me that McClintic-Marshall was the only concern in the country who had the length and size of plates for the girders. We made substitutions to conform with the material you had on hand, and you entered into a contract with me under these conditions and according to the specifications.

We changed our plans to suit the material that you had in stock and he informed me before he went away that as far as grillage was concerned, it was all in the shop and they were working on it, and now I understand from you that you are waiting for it from the mills. The Scandinavian-American Bank people are willing to pay you an extra price which was considerably more than anybody else figured in order to take the material from your stock which Mr. Chudduck informed me he had on hand.

A long time ago your Mr. Burpee informed us a lot of the material had already been cut from material that was already in stock. You are certainly laboring under a [510] wrong impression

as your steel for the grillage should have been shipped according to our contract long before the railroad strike occurred. I trust I shall get a very different report from you by return."

Exhibit No. 118.

Letter from Frederick Webber to McClintic-Marshall Company dated May 7, 1920.

"I don't seem to be able to get any satisfaction to my inquiries with regard to the steel work for the above building. It was thoroughly understood between your Mr. Chudduck and myself that the steel work was to either be bought in the open market, as per our specifications, or to be taken from stock. After making inquiries Mr. Chudduck informed me that he was able to get the material for the first four floors as per the requirements of the specification. He also informed me before taking the contract that he had been able to obtain the plates for the large girder over the banking rooms. The other work he desired to alter to suit such material as you have on hand, which he informed me was about 30,000 tons. Our steel plane and layout has been changed to suit this condition, and I can't understand why I cannot get more definite information in regard to this work. I am trying to find out how much of this has been fabricated. According to the contract, the grillage has to be shipped within two months from the 5th of February. Various changes were made in the grillage to suit the material you had on hand. Mr. Kennedy now informs me that you are wait-

ing to have these beams rolled at the mill which is so foreign to my [511] understanding, specifications and contract.”

“It seems to me that it will be necessary to keep a man to look after this work in Pittsburg as at the present time the letters I have been writing do not seem to bring any results. If it is necessary I will come to Pittsburg and go over this matter with you as it appears to me that you have not the right impression of this contract.”

Exhibit No. 122.

Letter from Frederick Webber to McClintic-Marshall Company dated June 12, 1920.

Your letter of June 10th received and contents noted. I am very much surprised to get your report. It is past my comprehension how you could have taken a contract and under such terms as are specified in our specifications and carried forward in your contract, and now, after four months, which is the expiration of your contract, to send me such a report as you do. Of course, it is quite evident that you did not have the material for the four floors in stock as Mr. Chudduck stated that you had, therefore you are not adhering to the specifications and contract. If you had four stories as per the contract, it would be possible for us to make a very good beginning, even if there was quite a delay on the other work.

In your report you do not say the condition of the work for the big girders and columns for the banking floor, what condition they are in or how

much work is being fabricated of same. The building committee has sent for me to come out there as they cannot understand why they are paying the highest price for the material and not receiving same, [512] and it was thoroughly understood that they should. You are putting me to the trouble of going there to explain why you have not lived up to your contract. According to your reports after four months not more than fifty per cent has even been rolled yet. This does not trouble me so much as the point that the four stories were to be taken from stock or bought in the open market and considering that the building company are paying you \$18,000 more than the contractors who figured on this work, but stated that they could not have the material in stock and would have to wait until it was rolled. As I stated, I must ask you for a more definite report on the work done on these first four floors.

Exhibit No. 125.

This is a statement showing the amount paid for extra work by the building company for correction of certain items and mistakes in the steel framework furnished by the complainant, aggregating \$3,000. [513]

Testimony of David L. Glenn, for the Receiver.

DAVID L. GLENN, a witness called on behalf of the Receiver, testified as follows:

I was the Assistant Superintendent in charge of the building; and have been engaged actively in steel erection business for fifteen years. A portion

(Testimony of David L. Glenn.)

of the steel furnished by the McClintic-Marshall Company was defectively fabricated, due to improper lengths, and improper placing of holes for rivets and bolts. The Scandinavian-American Building Company paid approximately \$3,000 to have these faults corrected. \$1626.41 of this amount was paid up to January 15, 1921, the balance was paid by the Receiver.

By Mr. LANGHORNE.—Are you on the second counterclaim now?

By Mr. OAKLEY.—Largely; yes.

Mr. LANGHORNE.—I will state to the Court *no* that the Court can keep it in mind, he has put in a counterclaim for some \$3,000 for correcting errors of fabrication. I think we will admit that there is about \$1100.00 that should be charged to us. The rest of it, I understand Mr. Oakley only claims there is about \$1600.00 he expects to prove.

Testimony of E. A. Gibbs, for McClintic-Marshall Company.

E. A. GIBBS, a witness called on behalf of McClintic-Marshall Co., testified as follows:

I am the manager of the McClintic-Marshall Company and the general freight rate increasing freight between Pittsburg and Tacoma went into effect August 25, 1920. [514]

Testimony of C. C. Sharpe, for the Receiver.

C. C. SHARPE, a witness called by the Receiver, testified as follows:

I was the bookkeeper of the Scandinavian-Ameri-

(Testimony of C. C. Sharpe.)

can Building Company. By reason of the increased freight rate, the Scandinavian-American Building Company was compelled to pay \$14,052.76 more than they would have paid if the materials had been shipped by the McClintic-Marshall Company prior to August 25, 1920. [515]

R. T. Davis, Jr., was manager of the Tacoma Millwork Supply Company during the time in issue (S. F., p. 372). Our principal work is interior finishing, windows and millwork of that nature (S. F. p. 373). We did the work on the Rust Building, a large modern office building across the street from the one in issue, and the Roosevelt High School at Seattle, and considerable work for the United States shipping corporation. (S. F., p. 373.)

“Q. Mr. Davis, at one time, about the 28th day of February, you entered into a form of contract did you not, with the Scandinavian-American Building Company, and prior to that you had submitted to them your proposal or bid, for all of the interior finishings and Bank fixtures and some other work?

A. Along about the seventeenth or eighteenth of February, 1920, we made proposals to Mr. Webber, the architect of the Scandinavian-American Building Company.

Q. I will ask you before you proceed, handing you a so-called general millwork contract, I will ask you if there is attached to it, the proposal which you submitted on the 17th day of February,—referring to it as Tacoma Millwork & Supply Com-

(Testimony of C. C. Sharpe.)

pany's Exhibit 151, for reference, is that the proposal?

A. There is a copy of the proposal attached.

Q. It is signed by Mr. Webber?

A. Signed by Mr. Webber, the architect.

Q. And it is attached to the formal contract dated the 20th day of February, is that right?

A. Yes, this is for material, 65,000.

Mr. FLICK.—We will offer this in evidence at this time.

Mr. HOLT.—Is the contract there too?

Mr. OAKLEY.—It is not a copy of the original.

Mr. FLICK.—This proposal is signed by Mr. Webber in the original, and we will offer this at this time, (referring to another paper); I have not the consent of Miss Carlson, but I will offer the original at this time.

The COURT.—That is the original?

Mr. FLICK.—This is a duplicate original.

The COURT.—It will be admitted. [516]

Mr. OAKLEY.—It is not to be introduced with the letter accompanying it, is it?

Mr. FLICK.—Surely, with the letter, that is part of our contract. Our proposal is referred to in the body of the main and formal agreement.

Mr. OAKLEY.—I cannot understand this letter of the 17th, which is addressed to Frederick Webber, the architect. It is signed, Tacoma Millwork & Supply Co. by Frederick Webber, architect.

Mr. FLICK.—It is just his method of signing it.

(Testimony of C. C. Sharpe.)

Mr. OAKLEY.—If you will follow that up and prove it, let it go.

WITNESS.—This is accepted by Frederick Webber, architect right there (indicating on exhibit.)

Said contract of Tacoma Millwork Supply Co. was received in evidence and marked Exhibit 151 (Flick).

Q. Frederick Webber never had any connection with your company in any way?

A. Absolutely no.

Q. In talking with Mr. Drury, what did he say as to the relationship Frederick Webber bore to this building?

A. Mr. Webber was the architect of the building and I presumed he had every authority to make contracts."

The material contract, Exhibit #151, is so designated and appears at the conclusion of this evidence, to it is attached a proposal dated February, the 17th, referred to in said contract and made part of said exhibit, addressed to Frederick Webber, Archt. and signed Tacoma Millwork Supply Co., by R. T. Davis, Jr., Manager. This proposal in practically similar form also attached to the material contract is signed by Frederick Webber, Archt. This was for Sixty-five Thousand Dollars (\$65,000). This proposal was accepted by Frederick Webber the architect and contains his signature (S. F., p. 374).

(Testimony of C. C. Sharpe.)

Another contract of a formal nature, dated February 28th was entered into and this is known as the work of erection contract. (This will be referred to hereafter as the Erection Contract). (S. F., [517] p. 376.) This was for Thirty Thousand Dollars (\$30,000) and was for the erection of the millwork upon the building. To this was attached our proposal of February the 17th with reference to this erection work and the formal contract with proposals and acceptance attached thereto is now in evidence as the Tacoma Millwork Company's Exhibit #152 and appears at the end of this evidence as such exhibit number and with it are proposals governing said work referred to in the main contract one signed "Tacoma Millwork Supply Co." and an acceptance signed by Frederick Webber, Archt., with the difference to be noted that the words "bond to be paid for by owner" does not appear in the acceptance. With it appears another proposal dated February the 18th, 1920, relating to door bucks, signed by Tacoma Millwork & Supply Co.

Then there was another contract which is called the Bank Quarters or Banking contract, and is set out at the end of this evidence, and is with this evidence as Tacoma Millwork Company's Exhibit #153. This contract had to do with the furnishing of Bank fixtures in the banking quarters of this building (S. F., p. 376.)

About ninety per cent of the material under these contracts was gotten out, fashioned and tendered to

(Testimony of C. C. Sharpe.)

the building company and under the labor contract we performed about twenty per cent of that labor leaving about eighty per cent unfinished on this labor contract which is the Thirty Thousand Dollars (\$30,000) contract (S. F., p. 377). The following occurred in court at this time:

“Q. (By Mr. FLICK.) Well, will you tell His Honor, please, Mr. Davis, the character of the work, just briefly, the especial character that went into this building.

Mr. OAKLEY.—At this time the receiver objects to the introduction to any testimony tending to sustain a lien claim in this action for the reason that in each of these three contracts the following provision is set forth: [518]

Article 14: “And the Contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanic’s claim or lien against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.”

That provision is found in each of the three contracts, and for that reason we maintain that the parties are estopped from proceeding to claim or attempt to claim any liens.

The COURT.—I will have to hear the evidence before I would know what the ruling would be, so that I will hold the objection as premature and will overrule it.

Mr. OAKLEY.—I am raising the question at this

(Testimony of C. C. Sharpe.)

point, as I do not wish to waive my rights. Note an exception to the ruling of the court.

The COURT.—“Allowed.” (S. of F., pp. 377, 378.)

The Millwork Company's Exhibit #154, found at close of this evidence, is a schedule or computation of all material completed and delivered in the warehouse or stored in the warehouse at the factory, or delivered on the building, including all work and material necessary under the contracts entered into. The legend at the side of this Exhibit “C. W.” means complete in the warehouse and “C. F.” means complete at the factory warehouse (S. F., p. 379). Some of the material is marked “partially completed” and for this no charge is made and on this we think there might be some salvage. This material was all specially designed (S. F., p. 379).

Mr. Oakley raises the objection that these defendants and cross-complainants “have no lien upon materials which have not been delivered to the premises and with which they have not parted possession.”

The objection is overruled and final ruling reserved.

Mr. OAKLEY.—“It might be understood that the objection [519] will go to all the testimony to materials not actually delivered.”

Mr. HOLT.—“Let it be understood that objections made by Mr. Oakley are made in behalf of

(Testimony of C. C. Sharpe.)

all the other defending attorneys and will be so considered." (S. F., p. 379.)

The COURT.—* * * His objection will be made in behalf of all claimants unless otherwise stated or indicated. (S. F., p. 380.)

We have two warehouses, one at our factory and the other at 2140 Pacific Avenue and the "D. F." would indicate the material stored at our warehouse at the factory and the "C. W." at the warehouse last designated.

Referring to Exhibit #154 the amounts set opposite each one of the separate lines represent the reasonable value of the material and labor entering into that material (S. F., pp. 380). That portion designated on Exhibit #154 as Exhibit "A-1" and Exhibit "B-1," that is the door buck contract and is incorporated in one of these contracts (S. F., p. 380), the one in reference to the erection of the work in the building, viz.: the thirty thousand dollar contract, the next sheet is "C-1" and that represents the bank quarters which is a separate contract and amounts to \$1759.00, the reasonable value for the material.

Mr. Oakley objects on the ground that these cross-complainants are relying upon the contract and that reasonable prices did not prevail.

Mr. FLICK.—"We are not relying on the contract, Mr. Oakley."

The COURT.—Objection was overruled. (S. F., p. 381.)

Exhibit "E-1" being a sheet attached to the main Exhibit #154, refers to scaffolding bucks which

(Testimony of C. C. Sharpe.)

were furnished on an open agreement and the amount represents the reasonable value at that time.

Exhibit "F-1" represents an open contract. Exhibit "G-1" [520] represents the premium on the surety bond which under the agreement was to be paid by the owner, viz.: \$718.41.

Mr. Oakley objects on the ground that it was not a lienable item.

The COURT.—Objection overruled (S. F., p. 382.)

This material is of no value if rejected after it is once manufactured (S. F., pp. 383.)

We furnished window frames and the sash, the interior doors and all the finish that goes with them. The interior is finished in mahogany and the exterior is finished in native wood, viz.: fir, under these contracts (S. F., pp. 383) and all of it is of a special design with particular size of openings and all made to fit this particular building, and these openings are not standard but are all special under architect's given dimensions, and the openings in this character of building vary being of one size in width and height in one building and another size in another building. (S. F., pp. 383). All the interior finish in its various parts, as for instance the door panels and sills of the doors, is all done to architect's details specially designed. This work could not be re-run for another job (S. F., p. 383). The doors are all made of laminated construction two, three or four ply with mahogany veneer on the surface. Photograph #155 shows the interior

(Testimony of C. C. Sharpe.)

mahogany door casings in the warehouse on Pacific Avenue together with window stools and window trim. Photograph #156 shows the exterior sash for these frames in the same warehouse. These photographs were taken January 25, 1921. Photograph #157 shows the exterior sash in the same warehouse. Photograph No. 158 shows some sash out at the factory warehouse. Photograph #159 shows some window frames and sash and inside door jambs at the factory warehouse. Photograph #160 shows interior finish and transom bars for these interior door frames [521] at the factory warehouse all ready to be set up. Photograph #161 shows a great quantity of mahogany doors with the door stiles made up and the mahogany veneer on them which required, however, a little more work by way of morticing and turning, smoothing and assembling the door pieces that are special in construction and it is very doubtful if we could rework them. The panels have already been placed in the doors and you cannot take a panel off without smashing it all to pieces. Photograph Exhibit #162 shows work of the door construction material and also a truck load of finish for window frames at the factory warehouse (S. F., pp. 387).

“Q. (By the COURT.) How can you say these doors were ninety per cent finished?

A. I don't think you got my answer quite correct. Mr. Flick asked me what proportion of the whole business were completed.

(Testimony of C. C. Sharpe.)

Q. Of the general contract?

A. We had to do some work on these doors and we only asked to be remunerated for what we had already done on these."

With reference to these doors we estimate a completed door at thirty dollars apiece and we are asking \$20; for what we have so far done on them. The one photograph does not show all the material for the work. Another photograph shows the panels that are already in these doors. This picture shows only a small part of the door. Photograph Ex. #163 shows some of the interior door jambs and some window frames, and in the distance there is another pile of window sash. These jambs are already morticed and *gained* ready to nail up. Photograph Exhibit #164 shows a lot of window and door casings at the factory warehouse and shows that we have already mitered the corners of these casings which involve labor performed under our labor erection contract. Instead of doing it on the job we did this at the factory. I do not see how these window and door and casings could be used in any other job (S. F. pp. 389). [522] Photograph Exhibit #165 was taken at the warehouse on Pacific Avenue and shows the sash already trimmed to fit into these window frames. This work is also a part of the erection labor. There is also on this photograph some base boards and shows that the painter for the Building Company had already started working on our material. Photograph Exhibit #166 shows a quantity of inside

(Testimony of C. C. Sharpe.)

door casings already glued upon the corners and ready for just nailing on to the wall. This also is erection work or work attributable to the thirty thousand dollar contract. This work also exhibits painters' material in preparation for work to be done by the building company's painters on our stuff.

"Q. What was the arrangement, Mr. Davis, with relation to painting and priming of this material, where was it to be done, and who arranged for the doing of that work?

A. Well, in our proposal, we made the suggestion to the architect, that unless he made some provision to prime this work, we would not guarantee it as against the elements; that is our work is subject to dampness, to even the slightest degree; it will very quickly go to pieces and be worthless and as a precautionary measure, I suggest to the architect, that they have their painter do the work before it left the warehouse. That was a matter of accommodation on our part.

Q. Do you know whether the painter had primed at the factory warehouse as well as at the warehouse down town?

A. The painter had primed at both places."
(S. F. pp. 390.)

We could not use the panel doors that have already been mortised and are ready for joining on any standard job because the specifications for this building were eastern specifications giving the doors a two inch thickness while the doors out west are

(Testimony of C. C. Sharpe.)

generally specified as an inch and three-eighths or an inch and three-quarters (S. F., p. 390), and architects are usually very particular as to their own designs on special buildings. One cannot use these [523] various windows and their members on some other job because architects usually design their buildings according to their own measurements and the measurements on this building were of extraordinary dimension, very wide and very high, and this construction as to windows was old-fashioned, double hung windows which nobody uses nowadays (S. F., p. 391).

We made deliveries to the building at various times up to July 31st and we had quite a quantity of window frames made at our factory and also at the warehouse, and we invoiced these and received part payment and payment was made largely on goods at the factory (S. F., p. 398). Mr. Webber visited the warehouse on Pacific Avenue and also came out to the factory about August 10th and inspected the window frames and Mr. Wells accompanied him, Mr. Wells being the superintendent of construction. Later Mr. Drury came out and saw the work and stated he was well pleased and wished us to hurry the work along (S. F., p. 392). Mr. Lindberg, one of the directors of the Building Company *the* the Bank was also there.

About December 30th, 1921, we had correspondence with Mr. Wells urging him to relieve us of the stuff at the factory and to take over the stuff at the warehouse.

(Testimony of C. C. Sharpe.)

Exhibits #166 and #167 indicate this correspondence, one is a letter signed by myself in behalf of the Company and the other is a letter signed by Mr. Wells. These exhibits appear at the close of this evidence. We were at that time pretty well along with the entire contract. We ceased work January 15, 1921, at 4:30 in the afternoon and began work, prepared drawings on this contract, on the 18th day of February, 1920, we contracted for a large supply of mahogany lumber, on the following day ordered some of the raw material that went into the frames, putting the same into the dry kiln (S. F., p. 394). At that time Mr. Webber and Mr. Drury knew [524] that we were to do this work at our factory by way of assembling the material and specially constructing it. (S. F., p. 394). The proposal of February 17th, accepted by Mr. Webber, contains the following phraseology: "Owing to the great quantity of this work and our limited storage facility it will be necessary that we ask you to provide storage space and accept delivery as fast as manufactured."

"Q. Later on did you have a talk with them from time to time as the contract, as to the progress you were making on the contract? A. Yes.

Q. And Mr. Wells? A. Yes."

I repeatedly, prior to writing this letter of December 30th, urged them to relieve us of this material (S. F., p. 395). Right from the start Mr. Webber urged upon us the fact that the vital thing in this contract was to get the building completed

(Testimony of C. C. Sharpe.)

before the Rust building was completed and that I would have to promise him to reserve sufficient capacity in the factory to complete the Scandinavian Building Company's order first. We obtained the Rust contract later. Mr. Drury, President of the Building Company and one of the trustees, urged us from time to time to keep after the work in that they would need it shortly. (S. F., p. 396.)

I asked them to take the frames off of our hands when a considerable portion had been worked up and Mr. Wells answered my letter making excuses which appears in the letter in evidence (S. F., p. 396.) We did not deliver on the building for the reason that there was no room for them there and they would not permit us to put them on the building because it would slow down the work, and for another reason, if we put it on the building, there being no roof, it would be the same as putting it in the street, it would [525] be raining and the stuff would be ruined and it was for their protection and at their own suggestion that it was kept in storage (S. F., p. 397). Prior to January 15, 1921, we rendered them an estimate for partially constructed work and asked them to accept it and allow us on account. This talk was with Mr. Wells. He okeh'd this estimate and he so stated to me. This material was partly at the factory warehouse and partly at the warehouse down town (S. F., p. 397). I had a phone conversation with him with reference to his approval of the estimate on both sets of material and I had another conversation

(Testimony of C. C. Sharpe.)

with him on the building itself (S. F., p. 398) after January 15, 1921. I asked him *if had* okeh'd our estimate for material for the month of December and he said he had. Later we tendered all this material to Mr. Haskell as receiver of the building. Immediately after he was appointed I tendered the key to the warehouse accompanied by a letter and stating that I understood the material came under his jurisdiction, and that he was welcome to it (S. F., p. 399). The letter of tender and the reply by Mr. Haskell are Exhibits #168 and #169 herewith. And Mr. Flick, my attorney, stated to Mr. Haskell in my presence that all of the material was his as receiver. I never received any order from him while he was receiver to place it on the building. I could not get him to take it. I had a conversation with Mr. Drury about the 15th of January about this material and also with Mr. Wells with reference to the delivery of the material that we had practically completed, in the last two days that the building was running. He was hurrying us up, wanted us to get all we possibly could up and while the steel erector had his crane in operation, and when trouble arose I talked with Mr. Drury and he said he did not see that we could do anything else but file a lien (S. F., p. 401).

When I first went into an agreement with these parties [526]

When I went into the proposal for this work about February 17, 1920, the first person I met was Mr. Frederick Webber, the architect, who in turn

(Testimony of C. C. Sharpe.)

introduced Mr. G. Wallace Simpson, to me. They came out to our factory at the same time, and that same afternoon I met them with Mr. Drury and Mr. Bean at the Tacoma Hotel. Mr. Larson stepped in. At the time I talked at the factory with Mr. Simpson and Mr. Webber, and came to an agreement that I should have the work. I handed my proposal to Mr. Webber, who after comparing it with some figures he had brought said "Well, you are in line for the work," and turning to Mr. Simpson added: "They have the best bid. Shall we let them have the work?" And Mr. Simpson said: "Yes, I don't see where we are going to better ourselves any." My dealings leading up to the formal contract were principally with Mr. Webber, Mr. Simpson and Mr. Drury. Mr. Larson was present at one conference held in Mr. Webber's office in the Tacoma Hotel, which I was told was the suite occupied by Mr. Larson. At that time Miss Carlson, who was presumably acting as secretary or stenographer for Mr. Webber, was also present. They did not take delivery of the material as fast as it was manufactured as provided for in the letter of February 17th.

Cross-examination.

(By Mr. OAKLEY.)

(We quote *verbatim* at this point from the record, beginning at page 403 and concluding on line 22, page 409. Exhibits herein mentioned are attached to the close of this evidence.)

"Q. You are familiar with the terms of the con-

(Testimony of C. C. Sharpe.)

tracts—each of these three contracts in which it is specifically provided, in the typewritten part of paragraph four, that the contractor shall complete the several portions and the whole of the contract by and at the time or times hereinafter [527] stated, all of the material to be delivered and put in place so that the whole can be completed within ten months from the date of this contract, and to be delivered as fast as the building will permit. You understood that was one of the terms of your contract, did you not?

A. Pardon me; which contract do you refer to, our labor contract or our material contract?

Q. This is the \$65,000 contract.

A. That is the general material contract.

Q. This is the contract for \$30,000, and that also has the same provision in it, hasn't it?

A. We also have a provision in our contract stating that the owner was to accept delivery from us as fast as manufactured.

Q. Where is that statement?

Mr. FLICK.—That is in the general contract, in the letter.

Q. That is in the letter that was apparently written by you and it states on the face that this letter was written on the 17th of February and this contract was entered into on the 28th of February.

Mr. FLICK.—The letter is made a part of the contract by the formal contract itself, so that there may be no question. According to the estimates

(Testimony of C. C. Sharpe.)

furnished by the witness on the 17th or 18th of February,—

Mr. OAKLEY.—That is not an estimate in any sense of the word.

Mr. FLICK.—Certainly it is an estimate, it is a proposal.

Q. Do you know what was furnished you in the matter of bidding on this contract, for you to submit your bids on?

A. You are referring to the plans?

Q. Yes, there was a set of plans and a set of specifications?

A. There was a set of plans and a set of specifications.

Q. And you bid on specifications similar to these I now hand you, did you not?

A. If these contained the carpentry specifications, I presume they are the same. They look different though, entirely from mine. Mine were blue-print specifications. This may be something entirely foreign to my specifications.

Q. I show you these specifications,—these are the specifications you bid on (referring to another package of papers). A. Yes. [528]

Q. When was this submitted to you?

A. At the time of bidding.

Q. At what time did you bid?

A. I bid prior to February 17, 1920, just the *exact* I do not know.

Q. These are what you bid on?

A. I based by contract on that.

(Testimony of C. C. Sharpe.)

Mr. OAKLEY.—I offer these specifications in evidence.

Mr. FLICK.—No objections.

(Said specifications were received in evidence and marked as Exhibit 169 (Receiver).)

Q. What material did you actually deliver to the building here?

A. I maintain I made delivery of all of the items I am suing for in my schedule.

Q. I ask you specifically what items you delivered on the premises here?

A. If you will allow me to refer to the schedule I can point out those items.

(Witness here referred to Exhibit 154.)

Q. You want to know what went on the building site?

Q. Yes, how many window openings did you deliver?

A. Where, to the building site?

Q. Yes, to the building site.

A. Our record shows 691 openings.

Q. What was the total provided for in the contract?

A. 929 openings according to our interpretation of the contract.

Q. Now, how many of those were completed and manufactured by you?

A. All entirely completed and painted.

Q. How many window sash did you deliver on the building premises?

(Testimony of C. C. Sharpe.)

A. There has been no window sash delivered on the building premises. [529]

Q. There have been no sash. Have there been any other items except 691 window openings delivered on the premises?

A. Yes, there has been. There is Exhibit "E," 80 pieces of scaffold bucks on open account April 20th.

Q. I am speaking of the contract. I am not questioning the open account.

A. These are all parts of the same.

Q. Entirely under your contract, how much did you furnish there other than you have stated?

A. There is nothing else on the building I know of other than the window frames on this contract.

Q. You invoiced certain of this material?

The COURT.—Are window frames and window openings synonymous?

A. A frame like that, for instance (indicating window in courtroom) contains what we term three openings. It is a triple window frame. If it is simply for one sash, we call it a single opening, and if there are two, we call it two openings. That building had mostly double frames, so that each window frame I would call two openings.

Q. You said 691 window openings? A. Yes.

Q. And you mentioned nothing else besides window frames?

A. The sash that go in there were not furnished to the building site.

(Testimony of C. C. Sharpe.)

Q. Were window openings and window sash two different things?

A. Yes, the sash are the frames that contain the glass for raising and lowering, and the frame contains the sash itself.

(By Mr. OAKLEY.)

Q. Have you been paid anything on this account?

A. Yes, we have been paid some on account.

Q. How much have you been paid on account?

A. Account of contract, or on the open contract?

Q. On the contract.

A. We show one amount of \$5,100 August 16th, and \$1,132.50 paid on September 18th.

Q. Did you say that was fifty-one hundred?

A. Yes. [530]

Q. I wish you would take this voucher of the Tacoma Millwork & Supply Co. (Counsel hands witness a paper.) A. Yes.

Q. Is that the item for which you were paid?

A. Well, this is the item for window frames as invoiced them, but I am not saying it belonged to that particular item. Our contract did not state where it should be applied.

Q. Did you invoice any other items than 680 window frames or openings to the Building Company at any time?

A. Later we invoiced some more to them.

Q. Have you got copies of those invoices?

A. I believe I have.

Q. Here, is it?

(Testimony of C. C. Sharpe.)

A. This is that small one, this is one here (indicating papers).

Q. Then on July 30, 1920, you invoiced 680 window frames openings? A. Yes.

Q. And that amounted to \$6,800 and you were given a check of 75% on that amount, as provided for in the contract were you not?

A. We were given \$5,100.

Q. That was 75% was it? You were paid 75%?

A. Approximately. I have not figured it out.

(Said invoice or estimate of Millwork Co. July 30, 1920, for \$6800 together with voucher attached, was offered and received in evidence and marked Exhibit 170 (Receiver).)

Q. I show you another one of like nature dated August 30th, 1920; that is for various items of window frames? A. Yes.

Q. It says, total openings 831 less 680; that was part of the other voucher here, wasn't it?

A. I believe it was.

Q. So that this was for 151 openings at \$10 an opening, \$1,510 so that you were paid 75% of that or \$1,325.00. [531]

A. We were paid that amount.

Q. Yes? A. Yes, sir.

(Said invoice or estimate of Millwork Co. Aug. 2, 1920, for \$1510 was offered and received in evidence and marked Exhibit 171 (Receiver).)

Q. So that you were paid 75% of each and every item that was actually delivered upon the building itself, the building premises?

(Testimony of C. C. Sharpe.)

A. No, you are mistaken there.

Q. That is what I want to straighten out.

A. There is some of these frames that are still at the factory, and that invoice may have cover them. I do not know as it was the particular frames that went into the building that is covered by the invoices.

Q. These invoices cover the frames, don't they?

A. They were simply a memorandum applying for some money on our account, as we needed it, not a particular sale of the goods.

Q. How many were actually delivered to the building then?

A. Well, we have a record of 691 openings.

Q. And you were paid for 831?

A. I am not sure, I am not saying as to that.

Q. Your invoices say 831, don't they?

A. That memorandum may show 831 openings, for all I know.

Q. Did you make any demand, did you send any invoices, or bills, any sort of statement to the Building Company covering materials manufactured by you and not yet delivered upon the building premises? A. Yes.

Q. To what amount?

A. They have our invoice of December 30, I believe. December 31st we billed them mahogany base and window apron trim in the amount of \$9202.50, and on January 7th there is an [532] estimate asking for \$1400.00 on window frames, these are in the bank quarters in the first floor

(Testimony of C. C. Sharpe.)

of the building (S. F., p. 409) and on January 6th there is an invoice for \$2,842.00 for 812 pieces of sash in the warehouse (S. F., p. 410). The labor contract was for \$30,000 and was for going into the building there after this material was placed on the building and then setting up this same millwork which we were furnishing under the first contract known as the material contract which specified a total of \$65,000 (S. F., pp. 410). There was quite a bit of labor performed under this labor contract, such as trimming the window sash so that they could be put into the frame without much or further work at the building (S. F., p. 410). This was not included in the material contract at all but would be work for the contractor or the one in charge of the building, this additional work. We would simply furnish it in the customary way (S. F., p. 411). I am speaking of the fit of the sash and of the additional work that would ordinarily be done on the building on our material by an independent laborer or contractor, such as trimming off the stiles of the sash, trimming off the bottom of the stiles and seeing that those fit without further work. Again we built up the window casings, mitered them together and glued them up, also the door casings, and thus save ourselves that expense on the building and thereby facilitate the work.

The \$65,000 covered merely the furnishing of the bare materials. We did not agree to deliver any of it, the company was to accept delivery from

(Testimony of C. C. Sharpe.)

us and it is obvious under the material contract that we did not have to put it in place. We would deliver it to the building at the best. That term—delivered there—put in place is a general form of contract, and that phrase there did not apply to furnishing materials only. That phrase applied to every kind of subcontractor who furnishes both labor and material on the [533] building. We performed under the \$30,000 contract \$6,043 worth of work entirely separate from the material contract. Mr. Webber accepted our proposal to furnish the material on the 17th of February and on the following morning he accepted the proposal to do the additional labor work and take the place of the carpenter on the job. He signed one on the 17th and one on the 18th, and the proposals for both contracts were being considered practically the same day, one in the forenoon and one in the afternoon.

(S. F., p. 414.) Direct Examination.

(By Mr. FLICK.)

The liens filed by the Tacoma Millwork Supply Co. were at this point received in evidence and marked Exhibits #172, #173 and #174 and are attached to the close of this evidence.

At Mr. Webber's request we rented the storehouse at 2140 Pacific Avenue and paid the rent, and at times had workmen there, and we had our material there covered by fire insurance and still have material in the same place, and in our factory

(Testimony of C. C. Sharpe.)

as well. I wrote the letter of August 3, 1920, which is in evidence as Exhibit 175, and which is addressed to Mr. Frederick Webber, architect, and reads as follows:

“In reply to your phone conversation in regard to the storage insurance and delivery of the millwork in storage for the Scandinavian-American Bank Building, we wish to state as follows:

We have and will keep the material in storage fully insured against fire loss, and in the event of fire loss we hereby agree to reimburse you to the full extent of your interest therein.

Also we agree to deliver all of this material to the building site upon your order.

We wish to state, too, that we will bear the expense of this accommodation ourselves as it is our desire and Mr. Webber's wish that we expedite the manufacture of this material and he acquiesced in this plan of procedure.”

Exhibits 170 and 171 contain specific amounts both as to [534] quantity and as to totalization and are estimates submitted to the architect. The basis of \$10 per opening is slightly less than the reasonable value, that is true of the window frames. We are not attempting to fix any value whatsoever but gave these in the form of memorandum so as to get a certain amount of money so that might apply on account of our contracts (S. F., p. 415). The \$10 for a window opening is merely an estimate and is underestimated for the reason that if we

(Testimony of C. C. Sharpe.)

had overestimated it at the time we presented it they would have gone over it, sent it back and we would not have gotten our claim through. Exhibit #176 is along the same plan and is all for the purpose of submitting an estimate to obtain money on account and I do not think that in these estimates our profits are included (S. F., p. 415).

Cross-examination.

(By Mr. OAKLEY.)

On the last sheet of Exhibit #154, Exhibits "A" to "G," inclusive, the total claim is \$68,748.33, then we gave a credit of \$6240.50 and these items were made up about the time we filed the lien and the balance due we claim was \$62,500 and to this we have added profit we were entitled to on the balance of the labor contract or \$6,000 and profit that we were entitled to on the balance of the main contract and bank contract \$1,000, making a total balance of \$69,507.83 and this includes the item of profit we would have made if the contract had been carried out. We figure slightly less than ten per cent. I signed these three contracts put in evidence for the Mill company. I signed the contracts for the mill company at the factory, my brother and sister being present. These contracts had not yet been signed by the building company (S. F., p. 417). Four or five copies were signed and were all turned over to Mr. Webber and one copy of the contract was returned to us. There is a provision as follows in this contract, viz: Ex-

(Testimony of C. C. Sharpe.)

hibit 151 [535] found at the close of this evidence.

“All the work aforementioned to be delivered and put in place so that the whole can be completed in ten months from the date of this contract and to be delivered as fast as the building will permit.”

A. I subsequently agreed to do it.

Q. You subsequently agreed to do it?

A. I agreed, according to the contract, to take my own material and go into that building and take the place of the carpenter and put it up; that is what I agreed to do.

Q. You agreed to furnish this material and put it in the building?

A. I agreed to do both, yes. (S. F., p. 419.)

Q. (By Mr. OAKLEY.) What has become of the \$10,500 you claim in your notice of lien, exhibit 172, you sustained as damages for breach of the \$30,000 contract? You have not testified about it in this action on the witness-stand.

A. I never saw any.

Q. You never saw this lien?

A. You asked me what became of the \$10,500, did you not?

Q. Yes.

A. Well, I have not seen it. (S. F., p. 420.)

The \$6,000 worth of work was performed on the labor contract known as the \$30,000 contract (S. F., p. 420). This was so that the millwork could be put in at the building more expeditiously and was for additional work on material that we had

(Testimony of C. C. Sharpe.)

manufactured (S. F., p. 421), and if we did not do it at the factory we would have had to do it at the building.

It is admitted that the \$6,000 is included in the \$10,500 referred to in Lien Exhibit #172. To the best of my judgment the work was 90 per cent complete on this material contract. (S. F., p. 423). We had finished 90 per cent of the millwork ready for delivery. The last lien filed covers the amounts claimed in the first liens. [536] (S. F., p. 424.) The six thousand and odd dollars embraced in the lien for work on the \$30,000 contract is embraced in the labor contract. Our men did the work to the amount of \$6,043 on the \$30,000 contract at the mill (S. F., p. 426).

Mr. FLICK.—The last page of Exhibit #154 details the various contracts and the profit claimed under those contracts, such as the door buck contract, the erection of labor contract, the open contract and bonds and the profit on erection (S. F., p. 426). At the time when we signed those contracts we attached a rider stating in effect that the lien would be revived if the building company did not make its payments (S. F., p. 427). I prepared the rider. I submitted it through my brother to Mr. Drury, and his associates.

“Q. (By Mr. FLICK.) I will ask you about when that was in reference to those proposals.

A. It was some time between the 20th and 28th.

Mr. OAKLEY.—I wish to object to that, it is

(Testimony of C. C. Sharpe.)

incompetent, irrelevant and immaterial; the contract is a written contract finally agreed upon by the parties and signed, and it contains all of the terms of this contract, and it seems to me it is just simply an attempt to vary the terms of that contract.

The COURT.—Whether it is altered in such a way as to amount to fraud or not—

Mr. LANGHORNE.—I want to ask, is there any allegation in the cross-complaint to that effect?

Mr. OAKLEY.—No.

Mr. FLICK.—Fraud and overreaching, surely.

Mr. LANGHORNE.—Is there any allegation that the contract as finally signed—(interrupted).

Mr. FLICK.—Sure.

Mr. LANGHORNE.—(Continuing.) —did not express its true terms?

Mr. FLICK.—Certainly. [537]

Mr. LANGHORNE.—By leaving out—

Mr. FLICK.—In the leaving out of this one item, but this is simply preliminary to the general fraud perpetrated.

Mr. LANGHORNE.—I did not see any such allegation in the complaint.

Mr. FLICK.—There is not, not along on this subject matter, but that is simply an element of fraud that entered into this thing.

Mr. LANGHORNE.—I submit if that be true there could not be any element of fraud in regard to that, but the cross-complaint should contain

(Testimony of C. C. Sharpe.)

the proper allegations in reference to reforming the contract to speak the truth.

The COURT.—That may be, if this were the only thing dependent upon to establish fraud, he cannot without pleading it prove it so as to enable him under the general prayer to reform the contract, yet it would be a circumstance bearing upon some other thing claimed as fraud.

Mr. FLICK.—That is all we are seeking to bring out in this connection.

The COURT.—The objection is overruled and I will try to rule out what is objectionable after the evidence is in, and not keep it out, at this time.” (S. F., pp. 427, 428, 429).

I instructed my brother not to turn over these contracts, which I had already signed at the factory, to Mr. Webber or Mr. Drury of the building company or its officers unless they accepted the rider reviving the lien. Then my brother phoned me in their presence that they objected and that all contracts must read exactly alike, that there were no other riders or alterations in anybody else's contracts and that Mr. Drury stated that they had \$400,000 cash on hand and a mortgage commitment for \$600,000 which would be the completion money and that there was no need of worrying and that if we were skeptical we could have the money in advance. I said, “If that is the case I don't mind taking \$15,000 right now. Will you let me have it on account?” and he said, “Certainly, but I will have to see Mr. Larson and

(Testimony of C. C. Sharpe.)

fix it with him." I came down [538] the next morning and took it up with Mr. Larson and it was arranged, but they required me to give a note, the excuse being that all the contract had not been entirely signed up for and the deal was not entirely completed, and it would be necessary for me to give the bank a note, but that it did not make any difference because they would take the note out of my last estimate due on the building. Every time the renewal of the note came up I mentioned the fact to Mr. Larson that our contract was not done, and that we could not pay it until it was taken out of our last estimate, and he nodded assent. (S. F., pp. 433, 434.) That Mr. Drury had stated that the steel people (McClintic-Marshall Company) and the terra cotta people has signed as well identical contracts (waiving the lien) (S. F., p. 432). I told my brother that if they had given him these assurances that we would have to submit to like terms (S. F., p. 433). About a week later we received our contract back. The following day I had a similar conversation with Mr. Drury in person and received practically similar assurances given to my brother (S. F., p. 433).

The record shows (pages —), that the manager of the McClintic people had not then agreed to waive their lien, but had distinctly reserved it (See also Exhibit "F," the contract), and that the terra cotta people had not waived their lien but had distinctly reserved it (Page 296, see also their con-

(Testimony of C. C. Sharpe.)

tract Exhibit 136). All exhibits being attached at close of evidence.

When I talked with Mr. Wells about the 6th or 8th of January, 1921, to the effect that the material was accumulating and we ought to make deliveries, he said: "Well, we won't take it on the building, you can see the shape the building is in, it is impossible. I am doing the best I can to take material off your hands. I cannot take it off your hands right now, but expect to [539] take some shortly." We had shown him on the memorandum furnished him how much was already in storage ready for them and had told him that we were pretty well along. I was after him all the time to take it out of the factory, and he replied he could not take any of it because he had no place to put it (S. F., p. 436). Under this material contract where lumber has been ripped up and cut to length it is a loss, but I did not take that into consideration (S. F., p. 437).

Recross-examination.

(By Mr. OAKLEY.)

"Q. You had in mind then the clause of this contract by which you waived or agreed to waive the lien in this case? A. Yes.

Q. Now, you knew that that clause did not mean anything at all if the contract was carried through, didn't you.

A. Well, if they would go through with that \$600,000.00 mortgage money for the completion of the building, we would be taken care of, of course.

(Testimony of C. C. Sharpe.)

Q. You do not answer my question. (Question repeated.) A. Yes.

Q. And you knew that clause was only of value to anybody when the contract was breached, didn't you? A. No, I did not know that.

Q. And if you had been paid there would have been no use. A. No.

Q. Now, you were speaking something of a rider. Have you any copies of that?

A. No. We left all the copies on the contracts: they should be in your files.

Q. Why didn't you keep a copy yourself?

A. Never occurred to me that they would not sign them up the way they were, and I would get it back.

Q. You signed that contract then knowing that you had waived your right of lien? [540]

A. I signed part of that contract. Now, let me make it clear. In the first place Mr. Webber had accepted our proposal and in that we waived no rights and we made our own terms of payment, etc. I started in immediately the next day at his request to perform work on that and I had gone on for perhaps a week before I ever saw this formal contract. I did not think that they would require a waiver of the lien after I had started work and when that came up that put another phase to the matter.

Q. You may state whether or not you were told that the company was negotiating for a loan with the Metropolitan Life Insurance Company and that

(Testimony of C. C. Sharpe.)

in order to get the loan there would have to be a lien waiver clause in your contract.

A. That is what I understood.

Q. Now, you were not told that they had the loan made at that time, were you?

A. Yes, I was told that they had the—well, in fact Mr. Simpson said that they had had the loan about completed.

Q. About completed? A. Yes.

Q. Was Mr. Simpson representing the Building Company in getting this loan from the Insurance Company?

A. It appeared to me, that he was acting for the Building Company and seemed to have lots of authority for them.

Q. He did not tell you that. What did he say?

A. He said that they had the building entirely financed and I presumed from that that this money was all to wind up the contracts, to complete the proposition.

Q. When these contracts were executed finally and definitely there were no changes in the contracts other than the one you have introduced here in evidence as you claim?

A. There was no after change,—the only change after I signed the contracts was the absence of the riders, they came back to me minus the riders after I had already signed.

Q. You went ahead and did all of this work knowing there were no riders on these contracts in reference to the waiver of the lien clause? A. Yes.

(Testimony of C. C. Sharpe.)

The COURT.—That applies both to the \$30,000.00 contract and the other contract?

A. Yes, all the way through with the excepting of what I [541] had started on before I received the contracts, and the open account. In the open account I waived no lien rights whatever.

Q. How much was in the open account?

A. Not very much.

Mr. LANGHORNE.—I think your honor misunderstood the testimony of the witness, the tenor of the testimony. He testified after his brother reported to him that Drury and Webber said all of these other contracts had the clause waiving the lien and he then consented. I do not understand whether you got that or not.

The COURT.—Yes.”

Redirect Examination.

(By Mr. FLICK.)

I relied upon the statement that the \$600,000 mortgage was absolutely financed and upon the statement that they had \$400,000 cash on hand. I had had certain business relations with Mr. Drury for a number of years and I would not have signed these contracts if I had not relied on his statement that the financing had been completed (S. F., p. 441), because I had already in my possession a proposal that they had accepted (S. F., p. 442). They stated to me that they had a commitment from the Metropolitan Life Insurance Company (S. F., pp. 442).

Mr. OAKLEY.—It is a conditional commitment. Mr. Drury told my brother, as I understood it, that

(Testimony of C. C. Sharpe.)

the steel people and the terra cotta people had signed a similar contract waiving their liens (S. F., p. 443). The contract with the McClintic-Marshall company is submitted in evidence and the contract of the terra cotta company with the Washington Brick Lime and Cement Company is also admitted (S. F., pp. 444).

Recross-examination.

(By Mr. OAKLEY.)

Q. After Mr. Drury told us that we could have the money in advance I asked him if he would let us have \$15,000 on account. [542] I got it, but I had to sign for it on a personal or firm note, on which I paid interest. I also paid back that note. The two contracts designated as a material contract and erection contract are dated alike and combined they provided for the installation in place of the interior millwork. (S. of F., pp. 445-446.)

The \$65,000 contract, Exhibit #151, embraces all labor necessary to turn a raw product into the finished millwork (S. F., pp. 446.) The carpenter would prepare the doors for hardware and putting them in place and hang them. The doors could not be made to exact dimension, they would be made to detail but not to exact dimension, the fitting would have to be done on the job under the labor contract (S. F., pp. 447.)

In our last lien, filed, Exhibit 174, the item of \$6043 is the amount of labor performed on the erection contract, and the other item of \$6,000 is a claim for our profit over and above the reasonable

(Testimony of C. C. Sharpe.)

value of the labor done on the erection contract. This \$6,000 would have been part of the profit only. I didn't try to get it all. I expected to make more than \$6,000, more than twenty per cent in that labor contract if they had fulfilled it. I said that the total profit on this job would amount to approximately speaking ten per cent of the total contract, material and labor as well. The lien is based upon the value of the goods when made, material and labor enters into that value, but just what proportion was labor and what material I could not say.

“Q. When you originally submitted your proposals you expected like in all other jobs of this size a formal contract would be entered into, did you not?”

A. I did not know what they intended on that score.

Q. Well, didn't you expect a formal contract; hasn't it been your experience that in cases of this kind a formal contract was entered into. [543]

A. No, I can cite you to the Rust Building contract. That was all done on an acceptance to a letter. No formal contract whatever. I had identical arrangements there with these people and I expected that when Mr. Webber had accepted our proposal that was going to constitute our agreement and there would be no further contracts coming up which would be signed, formal contracts.

Q. But there was a formal contract presented to you? A. Yes, there was later.

Q. And you, as you have testified, did execute that

(Testimony of C. C. Sharpe.)

contract? A. Yes, yes I am not denying that.

Q. And performed what work you did under that contract. A. Yes."

(Questions by Mr. BEDFORD.)

The labor performed in this building, that is distinct labor, was performed by my men (S. F., p. 453).

Redirect Examination.

(By Mr. FLICK.)

I found out when the bank failed (about January 15, 1921) that this building company did not have \$400,000 or any appreciable part of it. I did not find out until long after filing our first lien that the building company never had a definite commitment under the \$600,000 mortgage (S. F., p. 454).

Testimony of R. L. Reedy, for Tacoma Millwork Supply Company.

R. L. REEDY, called as witness for Tacoma Millwork Supply Company.

Direct Examination.

(By Mr. FLICK.)

I am sales manager for Wheeler Osgood Company. Considering the time and the character of the work I think the prices submitted by the Millwork Company on its material fair (S. F., p. 456). This character of material shown in Exhibit #154 is known as special work and when once cut and manufactured for a particular job it is very improbable that it could be used for any other purpose to any profit. (S. F., p. 457.) [544]

Testimony of George T. Davis, for Tacoma Millwork Supply Company.

GEORGE T. DAVIS, called by Tacoma Millwork Supply Co.

Direct Examination.

(By Mr. FLICK.)

I am assistant manager of the Tacoma Millwork Supply Company and have been engaged in that work six years making estimates etc. The prices shown in Exhibit #154 are very reasonable (S. F., pp. 648). Those pieces marked "No Claim" are partially worked up material but is still useful to us and for these we submit no claim. We had the material contract about 90 per cent complete (S. F., p. 649), and our charges are only for fabricated material either complete or in an advanced form ready to set up in the building by merely dovetailing or something of that kind, or in the case of stiles which are unusable elsewhere (S. F., p. 649). This material so fabricated is unusable except in this building, it has been made to specific sizes. The window frames, for instance, have to fit these terra cotta openings and steel openings, the door casings must fit these specific doors, and these casings fit these casings only. The window casings are made for these particular window frames (S. F., p. 650.)

The character of this material and work is unique and different for instance from the modern Rust Building across the street (S. F., p. 650). It is an older style of construction and it is almost impos-

(Testimony of George T. Davis.)

sible for this reason to get rid of it, there is no market. (S. F., p. 650.) It is very difficult to keep this expensive mahogany veneer after it has been run. The atmosphere will affect it and twist it. (S. F., p. 651.)

When I first met Mr. Webber it was in Mr. Larson's rooms. Mr. Simpson was present (S. F., p. 651). I gave Mr. Webber the figures verbally and he thought they were all right. He said he would visit the mill and see if we had ample capacity to [545] get the job out on time. While I was talking with Mr. Webber Mr. Drury came in saying that "Mr. Webber is our architect" and told Mr. Webber that any arrangement you can make with them (the Millwork Company) is satisfactory to me (S. F., p. 652). At the mill Mr. Webber concluded to give us the contract and on that day we tendered the proposals in evidence (S. F., p. 653), which are attached to the contracts and which are accepted by Mr. Webber. Then we commenced work (S. F., p. 653). We submitted detail drawings and bought green lumber and put it in the dry kiln, and immediately upon acceptance by Mr. Webber we contracted for mahogany lumber, paying \$5,000 the following day to be sure to hold it (S. F., p. 654). This before we knew that there was to be a formal contract. We first learned of the formal contract about the 25th of February (S. F., p. 654). When I brought the contracts to my brother we went over them carefully and saw the waiver of lien clause and finally drew a rider

(Testimony of George T. Davis.)

to offset it (S. F., p. 655), similar to the one my brother spoke of, and then we signed the contracts at our office and I brought them back to Mr. Webber with the rider attached with the understanding that I would leave these contracts for signature by the building company with the rider on. Mr. Drury objected strenuously to any alteration of the contracts (S. F., p. 655) and I asked him why. He says, "In the first place, we have the money. We have \$400,000 on hand, we have \$600,000 mortgage for the completion money"; and I hesitated and did not say anything, and he says: "Furthermore," he says, "these are an eastern form of contract," he says, "to my experience they won't hold in this State anyway," he says, "You know a contract is mutual, if we don't pay," he says, "the contract is broken, and you automatically get your lien back." (S. F., p. 656.)

Mr. Simpson, Mr. Larson, Miss Carlson, Mr. Larson's secretary, and Mr. Webber were present. Mr. Drury assured me that [546] if we were in doubt we could have the money in advance. He said that the contracts would have to be all alike and that the eastern finance people demanded the contracts with the waiver of lien clause (S. F., p. 656). Mr. Drury and Mr. Simpson confirmed each other by saying that the contracts must be uniform without any changes, Simpson saying that his people demanded that. Mr. Simpson was introduced as the agent of the Metropolitan Life which was financing this building, and Mr. Drury

(Testimony of George T. Davis.)

at this time said that the other people are accepting these contracts without any attachments and spoke of the steel people's contract, which he said was twice as large, and that the terra cotta people had accepted the contracts. I then called my brother, in their presence, on the phone stating Mr. Drury's refusal of the special rider, telling him the reasons that these gentlemen had just given me, and told my brother that Mr. Drury had assured me that the other people had all waived a right to lien. My brother has already repeated this conversation (S. F., p. 658), and I repeated his conversation to the gentlemen in the room. The riders remained attached when I left, but it was understood that under the assurances given and with the understanding had that the riders might be detached (S. F., p. 659).

We talked with Mr. Wells several times and begged relief from the overflow of material at the factory, and Wells said: "All you can do is keep it, I cannot put it on the building, you can see for yourself the condition the building is in" (S. F., p. 659). Our understanding with Mr. Webber was that they would take it as fast as manufactured in accordance with our written agreement. I personally showed Mr. Webber and Mr. Wells through our warehouse on the avenue and through our warehouse at the factory and spoke to him about the accumulating charges for rent, etc., and insurance, and he told us that the rent and matter of insurance would be taken care of on [547] final accounting.

(Testimony of George T. Davis.)

We then wrote a letter to Mr. Wells along about January 6th urging him to take this matter up and we received a reply stating that he could not take the material (S. F., p. 660).

The material would have been spoiled if it had been left where water and rain could get to it, which would have resulted if it had been delivered on the building as rapidly as manufactured, and would have been a heavy loss to the building company. In his letters he says: "We cannot see a way clear to receive the frames at the job right away." It is never customary to deliver this character of material on the premises until there is a roof on the building, and the building is in good shape to take care of it.

I delivered the key to the warehouse to Mr. Haskell. At that time payment had been made on account which would cover some work at the warehouse and some work at the factory (S. F., p. 661). Exhibit #168 is the letter accompanying the tender. Mr. Kelley was in the office with Mr. Haskell. Mr. Kelley read the letter, saying: "It is pretty good evidence I guess we will keep it." I then walked out and I next heard from them by Mr. Haskell calling our office when he said, "I have no use for this key. You had better call for it." We ignored them and then about an hour or so he sent the key back with a special messenger accompanied by a letter of which Exhibit #169 is a copy, dated March 8th, our tender letter being dated March 8th. We were at all times ready to deliver this material

(Testimony of George T. Davis.)

to the receiver and at all times ready to deliver material to Mr. Wells or the building company, in fact we urged them to take the material.

“Q. Was there any agreement verbal or otherwise, initially that you should store this material?

Mr. OAKLEY.—I object to that. The contract itself provided for delivery on the building. There is a general clause there containing that provision of the contract. It says “All negotiations or agreements oral or written prior to [548] this agreement are merged herein,” etc.

The COURT.—That may be the final ruling, but I will overrule the objection.

(Question read.)

A. We had an agreement with Mr. Webber,—well, in fact, when we first made this proposal I said to Mr. Webber, Now, you want this material, you want it right away, what are you going to do with it?

Q. What was his answer; what was his reason for wanting this material so urgently?

A. He told us, to get that building completed before the Rust Building and to give their painters ample time for painting the material, to do the painting work that had to be done on it.

Q. Who stated to you they wanted to finish it before the Rust Building was finished?

A. Why, Mr. Webber.

Q. For what reason did he express?

A. Mr. Webber and Mr. Wells,—

Q. Did he express a reason?

(Testimony of George T. Davis.)

A. I believe the reason was that the sooner they got it completed, the sooner they could get it rented and get ahead of the Rust people; in fact, I was given to understand that was one reason why we had to get that out and not have any delay.

Q. What did they say in response to your proposition that if you got it out as rapidly as that, what would be done with it?

A. Why, he told us to find some storage provisions somewhere; store it in the factory and let the overflow go into some warehouse somewhere and we will accept it that way and make payments on it as manufactured, and as you notify us, we will have our painters start work on it.

Q. Did you notify them from time to time that the materials were ready for painting? A. Yes.

Q. Did the Atlas Paint Company from time to time go in there and do the work of priming and painting, both at the warehouse and at the factory.

A. It was practically all primed at the factory and some at the warehouse.

Q. And this painter was in the employ, not of yourself, [549] but of the building company?

A. As I understand it, he had a contract with the building company. (S. F., p. 665.)

Q. Did you, or did you not, show Mr. Bean and Mr. Lindberg through the warehouse and factory and show them what you had finished for them?

A. Yes, I did.

Q. And in taking Mr. Wells through the factory

(Testimony of George T. Davis.)

and warehouse state whether or not he accepted it and approved it?

A. Yes, sir, he okehed our invoice or our estimates." (S. F., p. 665.)

These estimates applied to both places, the factory warehouse and the warehouse on the avenue, and payments were made both on material in the avenue warehouse and upon material at the factory (S. F., p. 665), and the acceptance by Mr. Wells were both of the material at the factory and the material at the warehouse (S. F. p. 665). Mr. Drury was through the factory with us and spoke highly of the material as did Mr. Lindberg. We pointed out the congestion at the factory to Mr. Drury when he made the excuse that the building was not far enough along, and that he did not see how they could take it, that it was up to Mr. Wells to take it when he could (S. F., p. 666). We relied absolutely upon the representations made about money on hand and about the mortgage fund for completion. Mr. Drury himself had done business with our company for sixteen or seventeen years.

Cross-examination.

(By Mr. OAKLEY.)

The proposals were written the 17th day of February, 1920, and Mr. Webber accepted these proposals February the 18th and we commenced work February the 19th. I brought the \$65,000 proposal to Mr. Webber in the late afternoon of February the 17th. We had been figuring a week or two in

(Testimony of George T. Davis.)

advance (S. F., p. 668), and we knew [550] the details that would go into that building a week before I saw Mr. Webber, approximately. (S. F., p. 669.) When we were called back to receive the formal contracts Mr. Webber had already accepted our proposals (S. F., p. 670). But we went ahead and executed a contract covering our bid of \$65,000. As to any provisions in any contract whereby the building company was to furnish storage space for the material, that we should manufacture, I believe our proposal and our letter of December 27, 1920, Exhibit #167, speak for themselves. That letter was written by the Tacoma Millwork Supply Company, by R. T. Davis.

It is true the letter says that "delivery of the frames at the building have not been actually delivered there through no fault of our own." This is letter Exhibit #167 dated December 27, 1920. Our contract was 90 per cent or better complete at that time and our proposal of the 17th is part of that contract (S. F., p. 671) and they were to take that material off our hands as fast as manufactured (S. F., p. 672), and we knew that they were to accept that material as manufactured and provide storage for it until the painters were through with it (S. F., p. 672), and the priming was to be done at our factory simply for their convenience and protection (S. F., p. 672).

Cross-examination.

(By Mr. HOLT.)

The initials "C. F." on Exhibit #154 means

(Testimony of George T. Davis.)

“complete at the factory” (and “C. W.” means “complete at warehouse”) and 90 per cent of this material contract was complete and ready for delivery as millwork at the premises (S. F., p. 673). There are several items listed in that Exhibit #154 which are incomplete and for which we are filing no claim, and it is so marked (S. F., p. 674), as for instance 18,000 lineal feet of base mold and 18,000 lineal feet of base shoe which are incomplete and for which we file no claim. [551] (S. F., p. 674). While the doors are about 75 per cent complete a general average would reach about 90 per cent for all the material. (S. F., p. 676.)

Redirect Examination.

(By Mr. FLICK.)

We had nothing to do with the painting or priming. We were through with the material when it was manufactured. The letter referred to by Mr. Oakley contains the following clause: “Owing to the great quantity of this work and our limited storage facility, it will be necessary that we ask you to provide dry storage space and accept delivery as fast as manufactured. And that was in accordance with our agreement.

“The COURT.—Is that in the proposal alone or in the formal contract?

By Mr. FLICK.—It is in the proposal accepted by Mr. Webber, accepted by his own original signature (see Exhibit attached).

The COURT.—Nothing said about the delivery of it in the formal contract?

(Testimony of George T. Davis.)

By Mr. METZGER.—This formal contract provides specifically for delivering it as fast as required.

By Mr. FLICK.—Yes, as fast as the building should permit, and the formal contract makes this proposal a part of the contract by referring to the proposal of February 17th and 18th, in the formal contract itself.” (S. F., p. 680.)

Cross-examination.

(By Mr. METZGER.)

We made the proposals on February the 17th and the written acceptance of them came the next day. The formal contract was submitted to us about February 25, and I examined these formal contracts very carefully in detail with my brother, familiarizing myself with every clause in them before I signed. My brother went through the whole printed contract and as the result of that careful inspection discovered the waiver of lien, and thereupon prepared a [552] rider which was attached with a clip. I have no copy of that rider (S. of F., 680, 682). We placed our order for mahogany February the 19th (S. F., p. 682). We put fir stock into the dry kiln and was intended for this job it being of a special size (S. F., p. 683). We have all the panels for each door made, all the rails and all the stiles complete, but the doors have not been glued up (S. F., p. 685). The work under the \$30,000 contract included some of the work of mitering, gluing up, rabbetting the bottoms. It

(Testimony of George T. Davis.)

is more convenient to do this at the factory (S. F., p. 688). While I did some of this myself we did it mostly with our employees. I was assistant manager (S. F., p. 688), my brother was the general manager, and I did some of the work myself on machines in the factory.

Redirect Examination.

(By Mr. FLICK.)

These panels are special and are made to detail, but they are odd sizes. The green lumber put into the dry kiln went into this job (S. F., p. 690). We ordered the mahogany February the 19th and on February the 26th the Erlich Harrison Company, who handled the mahogany, acknowledged our check for \$5,000 and definitely committed themselves.

Recross-examination.

(By Mr. METZGER.)

The dimension width and height of these doors makes them unusual, the thickness and the width of the stiles make them unusual (S. F., p. 691). We were under a demurrage charge of \$50.00 a day if we did not complete this contract in time (S. F., p. 872).

Testimony of C. D. Lindstrom, for Tacoma Mill-work Supply Company.

C. D. LINDSTROM, witness for Tacoma Mill-work Supply Co.

Direct Examination.

(By Mr. FLICK.)

I have been in the interior finishing and cabinet

(Testimony of C. D. Lindstrom.)

[553] business in the city of Tacoma 27 or 28 years, such as fine bank work and fixtures, residence interiors and special work. It is always made upon architect's specifications and drawings and is known as special work. I looked over the list showing prices and commodities as submitted by the Millwork Company and I consider their prices very fair (S. F., p. 694). In this character of work if it cannot be used in the particular building that it is designed for it is very hard to use this material, it is built for a special purpose for a certain space or opening and is almost impossible to find the same openings, the same depth and wall, and if you go to cutting it to pieces after it is put together in the frame you do not salvage much out of it, there is very little salvage. (S. F., p. 694.) The window frames and casings are absolutely valueless for anything else (S. F., p. 694), and unless you got an order for the same dimension and thickness and size for the doors they would have very little value. It has always been my experience that you are very lucky if you can use anything of special design such as this (S. F., p. 695). I do not see much chance for the disposal of this material. It would be necessary to use this material in this particular building to get any money out of it at all, and this work that is made up under ordinary conditions is practically valueless (S. F., p. 695). Prices given are reasonable as of that time, and the work is good quality. (S. F., p. 696). It was very near what I would con-

(Testimony of C. D. Lindstrom.)

sider a cabinet job of work that I saw. The work I saw was good work.

“The COURT.—Have you made up your mind as to the salvage value of the work.

A. No, sir; I have not.

Mr. FLICK.—We will have him do that. I will ask you, Mr. Lindstrom, to do that for us. I will say this, that we are not liening for anything that is not made up, and when you [554] speak of that that is made up you mean that which is mitered,—

A. The framework and everything ready to go right on the wall, set right up.

The COURT.—You are not liening for the rip on that that is sawed for length.

Mr. FLICK.—No, your Honor, I understand Mr. Davis is not liening for anything that is at all usable, that is simply ripped or sawed to length, except—

Mr. OAKLEY.—I understand that it is the baseboards and mouldings and all that, that is not cut; it is not cut for this particular building. He said it had to be cut when they got into the building. That is part of the \$30,000.00 contract.

Mr. FLICK.—We are not liening for anything that is simply cut and is still otherwise in its raw state, but we are liening for baseboards and mouldings and those things that have had for instance two long grooves cut in them that must fit in a special space, and it is absolutely valueless for any other

(Testimony of C. D. Lindstrom.)

place. I will have Mr. Davis explain all that to you.

Cross-examination.

(By Mr. OAKLEY.)

Q. Now, how about those baseboards and mouldings?

A. There was a big stock of them. They were all smoothed off and all grooved on the bench. They are already cut so that they cannot be used for lumber, but they are perfectly good for baseboard any place that you can use them. They are first class baseboard where you can use that detail base and that class of material.

Q. It is used generally, isn't it?

A. No, it is not.

Q. Any place around here you have seen it?

A. No, that Philippine mahogany is not used."

There are only two buildings in Tacoma that are finished in this material. All the door stocks are cut to length and the moulding is cut to sizes as well as the headers (S. F., p. 697).

"A. I did not see any doors made up. The core was made and the big panel I think was there, but they were in the rough. The side stiles are made up; and cedar core is made and then veneered on two sides with mahogany veneer. Some of the cores [555] was fully made up and had not received the mahogany veneer on it.

Q. What percentage would you say?

A. Well, I would say that there was about half of the door stock that was finished.

(Testimony of C. D. Lindstrom.)

Q. About half of what?

A. About half; about half of the door stock was already veneered, and the other half was glued up ready for the veneer; that is, the core was glued up to receive the veneer.

Q. Had some of it been veneered?

A. Yes, I would say that about half of it was. I would say that there was fully half of it. I did not go over it carefully. There were two piles of it.

Q. How about the use of these doors in any other building?

A. These doors could be used any place where you can get that length of door and the thickness. They are a thick door. A little out of the ordinary. They are a 2" door, that is something that is very seldom specified.

Q. That thickness is very seldom specified?

A. No. An inch and three-quarters is the ordinary heavy door in this country, and this is a two-inch door."

Direct Examination (Continued).

(By Mr. FLICK.)

I went out to the factory and warehouse after lunch and looked over the material again and there were 537 door stiles veneered and 356 stiles with the cores made up but not veneered, and in the pile I found the veneers cut for the bottom rails and top rails (S. F., p. 700). The panels are all complete and ready for the doors and the material for the doors is all there (S. F., p. 701), and I would say that 60 per cent of the labor is still to be done

(Testimony of C. D. Lindstrom.)

on the doors themselves (S. F., p. 702). There is quite an amount of labor in the way of handling and other work done on the 18,000 feet of base board, etc., run through the dry kiln and ripped up for which no charge is made (S. F., p. 704). Considering the [556] character of this work if it could not be used in this particular building there would not be any salvage (S. F., p. 706). It would simply depend upon some future chance. The mahogany base (for which no charge is made) is good base but is no longer good for lumber because of the groovings that have been put in it.

Work in addition to the ordinary factory specifications for mill work has been performed on this material (S. F., p. 707). You could not make these doors for much less than \$34 or \$36 in quantities (S. F., p. 709).

(Mr. HOLT.)

The baseboards are not junk (S. F., p. 712). They are perfectly good stuff.

Testimony of Elmer E. Davis, for Tacoma Millwork Supply Company.

ELMER E. DAVIS, witness for Tacoma Millwork Supply Co.

Direct Examination.

(By Mr. FLICK.)

Mr. Simpson, Mr. Drury and Mr. Larson stated to me that there was \$400.00 cash on hand and \$600,000 ready that they had borrowed on the mortgage (S. F., p. 714). This conversation occurred about

(Testimony of Elmer E. Davis.)

February 28th when I first noticed this lien waiver clause and they then said it was a requirement placed there by the Insurance Company who had loaned the money on the \$600,000 mortgage (S. F., p. 715). They stated that all the contracts would be signed alike with this waiver in it, and that mine was practically the last contract to be signed and that the other contracts had already incorporated the waiver of lien in them (S. F., p. 716) and with these assurances I signed the contract (S. F., p. 716).

Testimony of C. W. Lindstrom, for Tacoma Mill-work Supply Company (Recalled).

C. W. LINDSTROM, recalled for Tacoma Mill-work Supply Co.

Direct Examination (Cont'd).

(By Mr. FLICK.)

Speaking of salvage, if a man was to go out on the [557] market and try to dispose of this material at the present time in its entirety he would have a hard time to get any money out of it at all, but if he could hold it a year he might realize by selling a little at a time, three or four thousand dollars, figuring on the base and some of the panels and other pieces of suitable material. In that case he would have to insure it and store it (S. F., p. 717), then these charges would have to be deducted. He would simply have to take a chance. The unit of prices is fair in all cases. The matter of the doors as I said, about forty per cent of the labor has

(Testimony of C. W. Lindstrom.)

been done on these but that the material for the doors is all there (S. F., p. 718). The actual cost of the material with overhead would be about \$18.20 (S. F., p. 718), and a charge of \$20 for the doors made by the Millwork Company in their present state of completion is very fair, it is practically actual cost (S. F. p. 719). The labor on such a door is certainly \$10 at actual cost and his operating expenses would be 20 per cent at least (S. F., p. 719), and the total cost of the door with panels in quantities would be \$33.20.

Cross-examination.

(By Mr. METZGER.)

I am familiar with the 18,000 lineal feet of mahogany base mould, that is a member of the base, it is simply ripped and is useful material and therefore they make no charge for it. This material cost at the time \$300.00 a thousand or 30¢ a foot, but they may have bought it for less. You must figure 3¢ a foot for waste and for 2" mold 6¢ a foot for material. It cost a cent and a half to two cents to run and smooth it, or about 8½¢ for that stuff; and after it is completed it would be worth about 8¢ a foot for the molding. For 7¾ mahogany base board you must have 9" lumber. We figure three-fourths for material and add one-fourth for waste and cutting. [558]

The material would cost about 27½ cents raw, filling and smoothing would be about 3¢ and adding the rabbeting and dressing down would be 1½¢ for an inch foot, and 1½¢ for smoothing or 3½¢ for

(Testimony of C. W. Lindstrom.)

molding and smoothing. Twenty-four cents for molding and smoothing and about 26 or 27 cents for material. Fifty cents a foot would be a reasonable charge. You must make a deduction for waste on this base mold (S. F., pp. 721, 722). We figured about $6\frac{1}{2}\text{¢}$ of that for wastage, milling and smoothing or about 6¢ a foot on that mold, that is an inch foot. You waste about one-half of the mold ripping it. (S. F., p. 722.)

“Q. No, they are making no claim for mullion panel casing. What will that casing be worth per foot?

Mr. FLICK.—I do not see, when we are making no claim for that material, why he should go into it at that time. We are claiming, your Honor,—I just want to be corrected if I am wrong,—that the reasonable,—that is, we are claiming for the reasonable value of these items as they run down through these sheets, and we have specified no claims for various items, probably twenty items, making no claim for them whatsoever.

The COURT.—I suppose it is the purpose of counsel to show that you minimize all the materials you did not claim for. It would be some sort of an argument that you overcharged on the material that you did not claim for.

Mr. FLICK.—We are not claiming anything on these units that we say ‘No claim for.’

The COURT.—It does not seem to amount to a great deal, if counsel think they can develop some-

(Testimony of C. W. Lindstrom.)

thing out of it, I will give them a chance. Objection overruled.

A. I do not know what the mullion casings were, so that I could not say what they are worth.

Q. You do not know anything about what they are worth? A. No, I do not.

Mr. FLICK.—We would be glad to have Mr. Davis tell Mr. Lindstrom what they are, so that he can examine them. He did not look up anything for which there was no claim.

WITNESS.—These are not manufactured, so I have no chance to see about what they are. I have not seen them.”

(Mr. Davis, of the Tacoma Millwork Supply Co., explain these details of the mullion casings on the window frames.) [559]

C. W. LINDSTROM.—(Continuing.) Such casings would cost 35¢ lineal foot finished, of this 21¢ is for material. It is customary to figure 8 or 7 feet in this character of material and 10 feet for 9' 4" otherwise you would run short on cutting and wastage.

(Mr. Davis details the subjambs.) (S. F., p. 725.)

Mr. LINDSTROM.—(Continuing.) Those are worth 20¢ a foot, 12¢ for material and 8¢ for labor. The same overplus measurements would apply just given. The head subjambs are the same boards as the side subjambs. Fir subjambs, that lumber figured at that time about \$150 a thousand finished, board measure, 12" wide. Twelve to 15¢ a foot would be about right (S. F., p. 726) this would be

(Testimony of C. W. Lindstrom.)

for 12" side board, and it reduces it for a 4" sub-jamb to 4¢ or 5¢ a foot. Fir mullioned casing would run about 4¢ a foot; window stools about 7¢ or 8¢ a foot (S. F., p. 727). I examined the windows, that is the frame and sash both at the factory and at the warehouse (S. F., p. 727), they were all complete, all made up mold on them and everything complete. The sashes completed (S. F., p. 728). It seemed to me that a big portion of the casings were completed, that is ready to put together for the frames. I could not say how many were mitered and glued up, I did not count them. There is a whole warehouse full of this stuff right there (S. F., p. 728). Those in the rack were not mitered and glued up. (Witness indicated that a few were piled about "this size" that are not done.) (S. F., p. 729.) Possibly 50 were in the rack. It would take a man about an hour's work at least cutting the mitre, keying the joints there, glueing and smoothing up the joints, that is to make a casing and getting it into a frame like that one that is in the courtroom, possibly it would take longer. I would hardly dare to figure on an hour's [560] time to cover it, and it is worth \$1.00 net per hour, plus the overhead and insurance, or about \$1.50. An average man could not complete 8 frames a day. The same situation applies to mitering up, glueing and smoothing off the sides of the window casings. (Mr. Davis describes the work done on 405 window casings which are too large when assembled to go into the building.) (S. F., p. 731.)

(Testimony of C. W. Lindstrom.)

(That is the extra work which the erector would do.)

This is about the same work just described but it takes a little longer. You must fit them together, put your key in, make them apart again, then at the building they must be put together again and glued. The glueing and the keying would have to be done on the job.

There is an item of fitting 1848 pieces of sash into frames and preparing for hardware, that is erection work. I saw it. That would ordinarily be done in the building. I would not be prepared to say what that would be worth. A man would have to keep tab on the time it took to do it, and I am not prepared to say accurately what time it would take to do that portion of the work.

Q. As to these doors, your calculation as to the labor cost of completing them in the state in which they are now, would average about \$12?

A. No, the entire cost of the labor on the door, the labor could be made up for \$10, for actual cost of labor; adding 20 per cent for operating expenses would be \$12 as the cost of the labor, the entire cost of the labor in the door.

Q. Twelve dollars? A. Yes.

Mr. FLICK.—If the total door costs about \$32 and Mr. Davis charged \$20 his proportionate cost is about right, isn't it? A. Yes."

Testimony of E. C. Cornell, for Tacoma Millwork Supply Company.

E. C. CORNELL, witness for Tacoma Millwork Supply Co.

Direct Examination. [561]

(By Mr. FLICK.)

I have been a general contractor for 32 years (S. F., p. 733). I have seen the material at the warehouse on the avenue and at the warehouse at the factory, that Mr. Lindstrom has described. I figure that there might possibly be a thousand dollars of salvage in it, if we dispose of all of that material, and I compute this on the same basis that Mr. Lindstrom did. If we were going to hold it a year (S. F., p. 733) a man would have to find his market and he would have to persuade someone to design a building to fit the material. It is an eastern design and different from that of the western architects are specifying or detailing, and one would have to make an attractive price. You would have to persuade someone to use the material (S. F., p. 734).

We are to-day getting about 30 per cent more efficiency in labor than two years ago and are paying \$1.00 a day less (S. F., p. 736).

**Testimony of J. E. Bonnell, for Tacoma Millwork
Supply Company.**

J. E. BONNELL, witness for Tacoma Millwork
Supply Co.

Direct Examination.

(By Mr. FLICK.)

I am a contractor in the city of Tacoma and have been such for 30 years, and am familiar with interior finishing, I have seen the interior finish in storage, in issue in this case, and looked it over with Mr. Lindstrom and Mr. Cornell (S. F., p. 766). The panels of the doors are good and the base could be used, but the rest of the material is a pretty hard thing to put a price on (S. F., p. 767) for salvage, I would not give anything for it. It would be pretty difficult to sell it in the open market. I have been building for thirty years and have had occasion to use mahogany in only two buildings since that time. If a man had a place to store this material he might roughly estimate [562] \$3,000 or \$4,000 for it, then one would have to consider insurance and storage (S. F., p. 767). This job is very peculiar it is old style base and something that has not been done for years (S. F., p. 768).

**Testimony of R. T. Davis, for Tacoma Millwork
Supply Company (Recalled).**

R. T. DAVIS, recalled, continued his testimony.

Direct Examination.

(By Mr. FLICK.)

We have been paying \$100 for storing about half

(Testimony of R. T. Davis.)

of this material per month and now we are getting it at \$75 a month and in fact paid for one floor about \$150 a month for a short time. Insurance runs about \$160 a year. (S. F., p. 773.)

Testimony of George Davis, for Tacoma Millwork Supply Company (Recalled).

GEORGE DAVIS, recalled by Tacoma Millwork Supply Co.

Direct Examination.

(By Mr. PAUL.)

Mr. Drury, in the conversation with him, told me that the \$600,000 represented a first mortgage on the property, and that the building company were the full owners of the property with nothing against it except this \$600,000 mortgage (S. F., p. 774).

The Court thereupon, at the conclusion of the case, rendered its memorandum opinion which is a part of the transcript on appeal. Thereupon this appellant gave notice of appeal in open court on May 3d, 1922.

Exhibits No. 191 and 192 were introduced during the examination of Miss Carlson, the first being letters of the Far West Clay Co., and the second letters of the Washington Brick, Lime & Sewer Pipe Co. Originals being hereto attached at close of this evidence. [563]

Exhibit "F."**EXHIBIT "A."**

"THIS AGREEMENT, made this 5th day of February, 1920, by and between McClintic-Marshall Company of Pittsburgh, a Pennsylvania Corporation, hereinafter termed the CONTRACTOR, and Scandinavian-American Building Co., Tacoma, Washington, hereinafter named the PURCHASER,

WITNESSETH, That in consideration of the mutual promises hereinafter stated, the parties hereto mutually agree as follows:

ARTICLE I. The contractor agrees to furnish and deliver, f. o. b. cars, their works present rate of freight allowed to Tacoma, Washington, exclusive of spotting, switching or other delivery charges, the structural steelwork, for the Scandinavian-American Bank Building located at Pacific Ave. and Eleven Street, Tacoma, Washington, in accordance with plans, Job No. 148 Sheets 1 to 4 inclusive and 8 to 10 and specifications covering Steel and Iron Work as prepared by Frederick Webber, Architect and Engineer, 403 Morris Bldg., Phila., Pa.

ARTICLE II. The Contractor agrees to begin shipment of the material within 60 days and to make complete shipment of the material within 120 days after the date of this Agreement, provided all the required data are furnished by the Purchaser to the Contractor within five (5) days after the date of this Agreement, and provided further, that the Contractor is not obstructed or delayed by any act, neglect or default of the Purchaser or their em-

ployees or agents, or by the Rolling Mills, Transportation, Strikes, Fire, Storms, Floods or other causes beyond the reasonable control of the Contractor. [564]

The Purchaser agrees to accept delivery of material when forwarded from Contractor's works, or, upon transfer of title, to pay for said material as though it had been delivered under the terms of the contract and to reimburse the Contractor for any expense it may incur in storing, caring for and re-handling the same.

ARTICLE III. That Purchaser agrees to furnish the Contractor with complete and final date for this work within five (5) days after the date of this agreement.

ARTICLE IV. Upon written request, the Contractor shall provide, at such times and places as will least interfere with its operations, facilities for the inspection of the work by the Purchaser, but the Contractor assumes no liability for injuries sustained by the Inspector, except injuries due to the gross negligence or willful default of the Contractor. Any material condemned by the Inspector which is not in accordance with the plans and specifications and is, on this account, unsuitable for the purpose intended, will be replaced by other and suitable material. Any rejection of plain material by the Inspector must be made before shipment from the Rolling Mill and any rejection of finished material on account of workmanship must be made before shipment from the Contractor's works.

ARTICLE V. In consideration of the faithful execution of the work above specified to be performed by the Contractor, the Purchaser hereby promises and agrees to pay to the Contractor the sum of five and nine tenths cents (5.9¢) per pound f. o. b. their works present rate of freight allowed to Tacoma, Washington, exclusive of spotting, switching or other delivery charges. If freight rates or taxes are increased before shipment is made, the Purchaser is to reimburse the Contractor for such extra freight and tax paid, in funds current at par in Pittsburgh; or New York City as follows: 85% of the full value of each shipment on the 20th day of the month following date of such shipment, remaining 15% thirty days thereafter. [565]

ARTICLE VI. Failure by the Purchaser to make payments at the times stated in this Agreement shall give the Contractor the right to suspend work until payment is made, or, at its option, after thirty (30) days' notice in writing, should the Purchaser continue in default, to terminate this contract and recover the price of all work done and materials provided and all damages sustained; and such failure to make payments at the times stated shall be a bar to any claim by the Purchaser against the Contractor for delay in completion of the work.

ARTICLE VII. No alteration shall be made in the work except upon written order of the Purchaser or his authorized representative, and the amount to be paid by the Purchaser or allowed by the Contractor on account of such alterations is to be agreed upon within ten days from date of same.

Unless otherwise agreed upon, additional work will be charged by the Contractor at exact cost to the Contractor plus Fifteen (15%) per cent, for profit.

ARTICLE VIII. Should the Contractor at any time refuse or neglect to carry on the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the Purchaser, if not in default, shall be at liberty, after ten days' written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract.

ARTICLE IX. If at any time there shall be found established evidence of any lien or claim for which the Purchaser might be held liable arising out of any work or materials furnished by the Contractor, the Purchaser, upon presenting such evidence to the Contractor, may retain out of any payment due or to become due an amount sufficient to indemnify them against such lien or claim until it has been settled or discharged or until the Contractor furnishes to the Purchaser an indemnity bond equal in amount to said lien or claim. [566]

ARTICLE X. It is also further agreed between the parties hereto that any dispute whatsoever growing out of this Agreement shall be referred to three Arbitrators, one to be appointed by each of the parties to this Agreement and the third by the two thus chosen. Each Arbitrator shall be qualified by experience in Engineering and Contracting to perform the duties assigned to him. The decision of

any two of these shall be final and binding, and each of the parties to this Agreement shall pay one-half the expense of such reference.

IN WITNESS WHEREOF the parties hereto have executed this Agreement at Pittsburgh, Pa., the day and year first above written. Executed in duplicate.

SCANDINAVIAN - AMERICAN BLDG.
CO.

By CHARLES DRURY,
Prest.

J. V. SHELDON,
Secy.

McCLINTIC-MARSHALL COMPANY,
C. D. MARSHALL,
President.

Witness: G. L. TAYLOR. [567]

Exhibit No. 68.

SAVAGE-SCOFIELD COMPANY.

February 19th, 1920.

Mr. Frederick Webber,
c/o Tacoma Hotel,
Tacoma, Washington.

Dear Sir:

We are pleased to quote you prices f. o. b. job Scandinavian-American Bank Building, corner 11th and Pacific Avenue as follows:

Coarse gravel 2½" down—\$1.55 per cubic yard.

Coarse sand—\$1.55 per cubic yard.

Fine gravel 1½ inch mesh down—\$1.70 per cubic yard.

Fine sand for mortar work—\$1.55 per cubic yard.

Cement—\$3.78 per barrel f. o. b. team track, Tacoma or \$4.03 delivered by our trucks, f. o. b. building.

The above prices on cement include the sacks, which if you will return to factory yourselves we will render you the factory credit slip which will be 25¢ per sack for all good sacks. Or if you wish to return the sacks to us we will allow you 20¢ each for all good ones returned.

It is understood that sacks that are allowed to get wet are worthless as the factory absolutely refuses to take them back.

An additional allowance of 5¢ per barrel will be allowed on cement if invoice is paid within ten days of its date.

We agree to give you frank service and can take care of your requirements as needed as we have a large fleet of White trucks (the best that money can buy) and besides we are not engaged in any transfer business or drayage problem but maintain our delivery end for the prompt and efficient delivery of our own goods, thereby giving service and satisfaction to our customers.

We will give you a price on lime just as soon as we receive exact figures from the manufacturers.

Respectfully, yours,

SAVAGE-SCOFIELD COMPANY,

By H. O. SCOFIELD, (Signed)

Sect. and Treas. [568]

Exhibit No. 136.**EXHIBIT "A."****CONTRACT.**

THIS AGREEMENT, made this 28th day of February, A. D. 1920, by and between Scandinavian-American Building Company, a corporation, hereinafter called the "Owner," party of the first part, and Washington Brick, Lime & Sewer Pipe Company, a corporation organized and existing under the laws of the State of Washington, hereinafter called the "Contractor," party of the second part.

WITNESSETH:

WHEREAS, the said Scandinavian-American Building Company, Owner, is about to begin the erection of a sixteen-story building on the property situated in Pierce County, Washington, described as follows: Lots Ten (10), Eleven (11) and Twelve (12) in Block One Thousand Three (1003), as shown and designated upon certain plat entitled "Map of New Tacoma, W. T." of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Penn., architect, and

WHEREAS, The said Washington Brick, Lime & Sewer Pipe Company is desirous of entering into a contract with the said Scandinavian-American Building Company, Owner, to furnish all the terra cotta above the dentil course over the back on two sides, being 11th and Pacific Avenue, the alley side to run to the granite base; the rear to run down to the wall of the adjoining building, according to

estimate of February 19th, 1920, attached hereto; under and subject to all terms, limitations and conditions contained in the plans and specifications hereinbefore referred to.

NOW THIS AGREEMENT WITNESSETH:

ART. I. That in consideration of the agreements herein contained, the Owner agrees to pay to the Contractor, the sum of One Hundred Nine Thousand Dollars (\$109,000.00) in installments as hereinafter stated. Said payments, however, in no way lessening the total and final responsibility of the Contractor. No payment shall be construed or considered as an acceptance of any defective work or improper material.

Although it is distinctly understood and agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible, yet for the convenience of the Contractor, it is stipulated that the payments shall be made as follows:

75% monthly, to be paid in cash, of the estimated value of material delivered, and the balance of 25% to be paid within thirty (30) to sixty (60) days from the completion of this contract.

ART. II. The said Contractor hereby covenants, promises and agrees to do all of the aforesaid work to be furnished and finished agreeably to the satisfaction, approval and acceptance of the Architect of said building and to the satisfaction, approval and acceptance of the said Owner, according to the true intent and meaning of the drawings, plans

EXHIBIT "A" (Continued). Page 2.

[569] and specifications made by said Architect,

which said plans, drawings and specifications are to be considered as part and parcel of this agreement, as fully as if they were at length herein set forth and the said Contractor is to include and do all necessary work under this contract, not particularly specified, but required to be furnished and done in order to fully complete and fulfill his contract to the satisfaction of the said Architect and Owner aforesaid.

ART. III. The Contractor hereby agrees that time shall be considered the very essence of this contract and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the contractors are working. And the said Contractor further covenants and agrees to perform the work promptly, without notice on the part of anyone, so as to complete the building at the earliest possible moment.

ART. IV. The Contractor further covenants and agrees to observe carefully the progress of the work up to the entire building, without notice from anyone, and to procure drawings at least two weeks prior to executing the work, and to perform his portion of the work upon said building at the earliest proper time for such work, and to be responsible for all loss occasioned directly and indirectly by any lack of knowledge upon his part, as to the proper time to perform his work.

ART. V. The said Contractor shall complete the several portions and the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz.:

Delivery of the aforementioned material to commence within four (4) months from the date of this contract, and to be completed within six (6) months.

Should the Contractor be delayed in delivering his material, by the Owner, certificates are to be given for payment for the material completed at the factory.

ART. VI½. The Purchaser shall furnish to the Manufacturer such further drawings or explanations as either party may consider necessary to detail and illustrate the work to be made, and the Manufacturer shall conform thereto as part of this contract so far as the same may be consistent with the original drawings and specifications hereinbefore referred to and with the technical possibilities of the material.

ART VI. Should the Contractor be delayed in the progress of the work under this contract by strike, or common carrier, or casualty wholly beyond the control of the Contractor, then the time herein designated for the completion of said work shall be extended for a period equivalent to the time lost, but no such allowance shall be made unless a claim therefor is presented in writing by the Contractor within twenty-four hours of the occurrence of such delay. [570]

Page 3.

ART. VII. And in case of default in any part of the said work within the times and periods above specified, the contractor hereby promises and agrees to pay the Owner, and the Owner may deduct from any amount coming to the Contractor the sum

of Fifty (\$50.00) Dollars for each and every day's delay until the completion of the work, not in the nature of a penalty, but in the nature of liquidated damages for the delay caused to the Owner in the completion of the work.

ART. VIII. Any imperfect workmanship or other faults which may appear within one year after the completion of said work, and in the judgment of said Architect arising out of improper materials or workmanship, shall, upon the direction of said Architect, be amended and made good by, and at the expense of, said Contractor, and in case of default so to do, the Owner may recover from said Contractor the cost of making good the work.

ART. IX. The Contractor hereby agrees to remove the dirt and rubbish accumulating on the premises, caused by the construction of his work, at such time or times as he may be instructed by the Owner or his representatives, and if not removed promptly by the Contractor, the Owner is hereby authorized to remove the same at the expense of the said Contractor, and to deduct the cost thereof from any balance that may be due and owing him.

ART. X. And should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or materials of the proper quality or fail in any respect to prosecute the work with promptness and diligence or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being cer-

tified by the Architect or the Owner, the latter shall be at liberty after two days' written notice to the Contractor to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect or the Owner shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon and to employ any other person or persons to finish the work and provide the materials therefor; and in case of such discontinuance of the employment of the Contractor, the latter shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work said excess shall be paid by the Owner to the Contractor; but if said expenses shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expenses incurred by the Owner as herein provided, either for furnishing the materials or for finishing the work and any damage incurred through such default shall be itemized and certified by the Owner, which itemized statement shall be conclusive upon the Contractor. [571]

ART. XI. And the Owner reserves the right that if there be any omission or neglect on the part of the said Contractor of the requirements of this agreement and the drawings, plans and specifications, the said Owner may, at its discretion, declare this contract, or any portion thereof, forfeited; which declaration and forfeiture shall exonerate, free, and discharge the said Owner from any and all obligations and liabilities arising under this contract, the same as if this agreement had never been made; and any amount due the Contractor by reason of work done or materials furnished prior to the forfeiture of this contract, shall be retained by the said Owner until the full completion and acceptance of the building upon which said work has been done or said materials furnished, at which time the said Owner, after deducting all costs and expenses occasioned by the default of the said Contractor, shall pay or cause to be paid to him the balance with a statement of all said costs and expenses.

ART. XII. And the contractor further covenants, promises and agrees that he will make no charge for any extra work performed or materials furnished in and about his contract, and he hereby expressly waives all right to any such compensation, unless he shall first receive an order in writing for the same from the Owner.

ART. XIII. And the Contractor hereby assumes entire responsibility and liability in and for any damage to persons or property during the

fulfillment of this contract, caused directly or indirectly by the Contractor, his agents or employees, and the Contractor agrees at his own expense to carry sufficient liability and workmen's compensation insurance and to enter in and defend the Owner against, and save it harmless from loss or annoyance by reason of suits or claims of any kind on account of such alleged or actual damages; or on account of alleged or actual infringements of patents in regard to any method, device or apparatus, or any part thereof, put in, under, or in connection with this contract, or used in fulfilling the same.

The Contractor hereby further agrees not to assign or sublet in any manner whatsoever, any part or portion of this contract, without the written consent of the Owner, upon the express penalty of forfeiture of the entire contract, in the discretion of the Owner.

ART. XV. And the Contractor shall at all times, when required by the Owner, before receiving any moneys under this contract, produce satisfactory vouchers and receipts from all employees and materialmen for work done and materials furnished in and about the erection and completion of the building covered by this contract.

ART. XVI. And any and all work that may be cut out and omitted from this contract, during the progress of the work, shall be allowed by the Contractor at the regular contract price, and shall be adjusted and agreed upon by said parties before the final settlement of their accounts. [572]

ART. XVII. The Owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part thereof, or to any of the materials or other things done, furnished and supplied by the Contractor, used and employed in finishing and completing the same.

ART. XVIII. It is hereby further mutually covenanted, promised and agreed, by and between the said parties, that in the event of any dispute or disagreement hereafter arising between them as to the character, style or portion of the work on said buildings to be done, or materials to be furnished under this contract, or the plans and specifications hereinbefore referred to, or any other matter in connection therewith, the same shall be referred to three arbitrators, one to be chosen by each of the parties hereto, and the third by the two arbitrators so selected, whose decision, or that of a majority of them in the matter, shall be final and binding upon them.

ART. XIX. The Contractor shall, upon request from the Owner, furnish forthwith a bond or bonds in form and substance and with surety satisfactory to the Owner, in the sum of Fifty-four Thousand (\$54,000.00) Dollars conditioned for the true and faithful performance of this contract on the part of the Contractor. The Bond, however, to be paid for by Owner.

ART. XX. All negotiations and agreements, oral or written, prior to this agreement, are merged

herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except as herein set forth. This agreement cannot be changed, altered or modified in any respect except by the mutual consent of the parties endorsed hereon in writing and duly executed.

The Contractor has read and fully understands this agreement and the said Contractor hereby certifies that before the execution of this agreement he examined all the plans and specifications prepared in connection with the contract.

And it is further agreed that the covenants, promises and agreements herein contained shall be binding upon and final upon the heirs, executors, administrators and successors of the parties hereto.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of
SCANDINAVIAN-AMERICAN BUILD-
ING COMPANY,

By CHARLES DRURY,
Its President.

J. SHELDON,
Its Secretary.

WASHINGTON BRICK, LIME & SEWER
PIPE CO.,

Contractor.

By V. E. PIOLLET,
Vice-President.

CHARLES P. LUND,
Sec'y. [573]

Exhibit No. 151.

THIS AGREEMENT made this 28th day of February, A. D. 1920, by and between Scandinavian-American Building Company, a corporation, hereinafter called the owner, party of the first part, and Tacoma Millwork Supply Company, hereinafter called the contractor, party of the second part.

WITNESSETH:

WHEREAS, the said Scandinavian-American Building Company, Owner, is about to begin the erection of a 16-story building on the property situated in Pierce County, Washington, described as follows: Lots Ten (10), Eleven (11), and Twelve (12) in Block One Thousand Three (1003), as shown and designated on a certain plat entitled "Map of New Tacoma, W. T." of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Penn., architect, and

WHEREAS, the said Tacoma Millwork Supply Co. of Tacoma, Wash., is desirous of entering into a contract with the said Scandinavian-American Building Company, Owner, to furnish all of the interior millwork with the exception of Bank Quarters; also all of the interior window and door frames, for the sum of Sixty-five Thousand (\$65,000) Dollars.

All plaster grounds to be furnished at a price of \$8.00 per thousand lineal feet on $\frac{3}{4} \times 1\frac{5}{8}$ grounds, according to estimates furnished by party

of the second part, dated Feb. 17th and 18th, 1920, under and subject to all terms, limitations and conditions contained in the plans and specifications hereinabove referred to.

NOW THIS AGREEMENT WITNESSETH,

ART. I. That in consideration of the agreements herein contained, the Owner agrees to pay to the Contractor the sum of Sixty-five Thousand (\$65,000) Dollars in installments as hereinafter stated. Said payments, however, in no way lessening the total and final [574] responsibility of the Contractor. No payment shall be construed or considered as an acceptance of defective work or improper material.

Although it is definitely understood and agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible, yet for the convenience of the contractor, it is stipulated that payments shall be made as follows:

75% monthly to be paid in cash upon the 15th of each month, provided estimates are furnished to the Architect on or before the first of each month, of the estimated value of the work delivered and erected, and the balance of 25% to be paid within 30 to 60 days from the completion and acceptance of the millwork material furnished and covered by this contract.

ART. II. The said Contractor hereby covenants, promises and agrees to do all of the aforesaid work to be furnished and finished agreeable to the satisfaction, approval and acceptance of the Architect of said building and to the satisfaction, approval

and acceptance of the said Owner, according to the true intent and meaning of the drawings, plans and specifications made by said Architect, which said plans, drawings and specifications are to be considered as part and parcel of this agreement, as fully as if they were at length herein set forth, and the said Contractor is to include and do all necessary work under his contract, not particularly specified, but required to be furnished and done in order to fully complete and fulfill his contract to the satisfaction of the said Architect and Owner aforesaid.

ART. III. The Contractor hereby agrees that time shall be considered the very essence of this contract and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the contractors are working. And the said contractor further covenants and agrees to perform the work promptly, without notice on the part of anyone, so as to complete the building at the [575] earliest possible moment.

ART. IV. The Contractor further covenants and agrees to observe carefully the progress of the work upon the entire building, without notice from anyone and to procure drawings at least two weeks prior to executing the work, and to perform his portion of the work upon said building at the earliest possible time for such work, and to be responsible for all loss occasioned directly and indirectly by any lack of knowledge upon his part, as to the proper time to perform his work.

ART. V. The said Contractor shall complete the several portions and the whole of his work, comprehended under this agreement by and at the time or times hereinafter stated, viz.: All the work aforementioned to be delivered and put in place so that the whole can be completed in ten (10) months from date of this contract, and to be delivered as fast as the building will permit.

ART. VI. Should the contractor be delayed in the progress of the work under this contract by strikes, or common carrier, or casualty wholly beyond the control of the Contractor, then the time herein designated for the completion of said work, shall be extended for a period equivalent to the time lost, but no such allowance shall be made unless a claim therefor is presented in writing by the Contractor within twenty-four hours of the occurrence of such delay.

ART. VII. And in case of default in any part of the said work within the times and periods above specified, the Contractor hereby promises and agrees to pay the owner, and the owner may deduct from any amount coming to the Contractor the sum of Fifty (\$50) Dollars for each and every day's delay until the completion of the work, not in the nature of a penalty, but in the nature of liquidated damages for the delay caused to the owner in the completion of the work. [576]

ART. VIII. Any *unperfect* workmanship or other faults which may appear within one year after the completion of said work, and in the judgment of said Architect arising out of improper

materials or workmanship, shall, upon the direction of said Architect, be amended and made good by, and at the expense of, said Contractor, and in case of default so to do, the Owner may recover from said Contractor the cost of making good the work.

ART. IX. The Contractor hereby agrees to remove the dirt and rubbish accumulating on the premises caused by the construction of his work, at such time or times as he may be instructed by the Owner or his representatives, and if not removed promptly by the Contractor, the Owner is hereby authorized to remove the same at the expense of the said contractor, and to deduct the cost thereof from any balance that may be due and owing him.

ART. X. And should the Contractor at any time refuse or neglect to supply sufficient of properly skilled workmen or materials of the proper quality or fail in any respect to prosecute the work with promptness and diligence or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect or the Owner, the latter shall be at liberty after two day's written notice to the Contractor to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect or Owner shall certify that such refusal, neglect or failure is sufficient grounds for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and

to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon and to employ any other person or persons to finish the work and provide the materials therefor, and in case of such discontinuance of the [577] employment of the Contractor, the latter shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished at which time if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work said excess shall be paid by the Owner to the Contractor; but if said expenses shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expenses incurred by the Owner as herein provided either for furnishing the materials or for finishing the work and any damage incurred through such default shall be itemized and certified by the Owner, which itemized statement shall be conclusive upon the Contractor.

ART. XI. And the Owner reserves the right, that if there be any omission or neglect on the part of the said Contractor or the requirements of this agreement and the drawings, plans and specifications, the said Owner may, at its discretion, declare this contract, or any portion thereof, forfeited; which said declaration and forfeiture shall exonerate, free and discharge the said Owner from any and all obligations and liabilities arising under this contract, the same as if this agreement had never

been made; and any amount due the Contractor by reason of work done or materials furnished prior to the forfeiture of this contract, shall be retained by the said Owner until the full completion and acceptance of the building upon which the said work has been done or the said materials furnished, at which time the said Owner, after deducting all costs and expenses occasioned by the default of the said Contractor, shall pay or cause to be paid to him the balance with a statement of all said costs and expenses.

ART. XII. And the Contractor further covenants, promises and agrees *the* he will make no charge for any extra work performed or materials in and about his contract, and he hereby expressly waives all right [578] to any such compensation, unless he shall first receive an order in writing for the same from the Owner.

ART. XIII. And the Contractor hereby assumes entire responsibility and liability in and for any damage to persons or property during the fulfillment of this contract, caused directly or indirectly by the Contractor, his agents or employees, and the Contractor agrees at his own expense to carry sufficient liability and workmen's compensation insurance and to enter in and defend the Owner against, and save it harmless from loss or annoyance by reason of suits or claims of any kind on account of such alleged or actual damages, or on account of alleged or actual infringements of patents in regard to any method, device or apparatus, or any part

thereof, put in, under or in connection with this contract, or used in fulfilling the same.

The Contractor hereby further agrees not to assign or sublet in any manner whatsoever, any part or portion of this contract, without the written consent of the Owner, upon the express penalty of forfeiture of the entire contract, in the discretion of the Owner.

ART. XIV. And the contractor further agrees for himself, his heirs, executors, administrators and assigns to waive any and all right to any mechanic's lien or claim against said premises, and hereby expressly agrees not to file any claim or lien whatsoever against the premises involved in this contract.

ART. XV. And the Contractor shall at all times when required by the Owner, before receiving any moneys under this contract, produce satisfactory vouchers and receipts from all employees and materialmen for work done and materials furnished in and about the erection and completion of the building covered by this contract.

ART. XVI. And any and all work that may be cut out and omitted from this contract, during the progress of the work, shall be allowed by the Contractor at the regular contract price, and shall be adjusted [579] and agreed upon by said parties before the final settlement of their accounts.

ART. XVII. The Owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part thereof, or to any of the materials or

other things done, furnished and supplied by the Contractor, used and employed in finishing and completing the same.

ART. XVIII. It is hereby mutually covenanted, promised and agreed, by and between the said parties that in the event of any dispute or disagreement hereafter arising between them as to the character, style or portion of the work on said buildings to be done, or materials to be furnished under this contract, or the plans and specifications hereinabove referred to, or any other matter in connection herewith, the same shall be referred to three arbitrators, one to be chosen by each of the parties hereto, and the third by the two arbitrators so selected, whose decision, or that of a majority of them in the matter, shall be final and binding upon them.

ART. XIX. The Contractor shall, upon request from the Owner, furnish forthwith a bond or bonds in form and substance and with surety satisfactory to the Owner, in the sum of Thirty-two Thousand (32,000) Dollars, conditioned for the true and faithful performance of this contract on the part of the Contractor.

ART. XX. All negotiations and agreements, oral or written, prior to this agreement, are merged herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except as herein set forth. This agreement cannot be changed, altered or modified in any respect except by the mutual consent of the parties endorsed hereon in writing and duly executed.

The Contractor has read and fully understands this agreement and the said Contractor hereby certifies that before the execution of this agreement he examined all the plans and specifications prepared [580] in connection with the contract.

And it is further agreed that the covenants, promises and agreements herein contained shall be binding and final upon the heirs, executors, administrators and successors of the parties hereto.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of
SCANDINAVIAN-AMERICAN BUILD-
ING CO.

By CHARLES DRURY,
Its President.

J. SHELDON,
Its Secretary.

TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS, Jr.
G. L. DAVIS,
Contractor. [581]

EXHIBIT No. 151.

February 17, 1920.

Mr. Frederick Webber, Archt.
Tacoma, Wash.

Dear Sir:

Re: 16 Story Scandinavian-American Bank Bldg.,
Tacoma.

Confirming our verbal conversation of this morning, we will agree to furnish you with all of the

millwork for the above building (with the exception of Bank quarters) and as per your plans and specifications, and the following understanding, for the sum of Sixty-five Thousand Dollars (\$65,000.00) net cash.

It is understood by the above general term of "Millwork" that we furnish no flooring, glass or hardware, or metal covered work.

It is also understood that the material for the exterior window frames and sash shall be of V. G. Fir. The interior trim throughout to be of Philippine Mahogany, with the doors veneered with the harder species on the stiles and rails, with Honduras Mahogany panels.

Owing to the great quantity of this work and our limited storage facilities, it will be necessary that we ask you to provide dry storage space, and accept delivery as fast as manufactured.

We also suggest that the painter's priming be done by you at our factory, before delivery, as without this precaution we could not guarantee the work.

As to the terms of payment, we would expect 75% of the estimated value of the work delivered, or accepted for delivery, to be paid us on or before the 10th of the current month, for all the previous month's work, and the balance of 25% to be retained to be paid within 30 or 60 days of completion and acceptance of the entire contract.

Respectfully submitted,

TACOMA MILLWORK SUPPLY CO.

By FREDERICK WEBBER (Signed),

Arch't. [582]

EXHIBIT No. 151.

Tacoma, Wash., February 17th, 1920.

Mr. Frederick Webber, Archt.

Tacoma, Wash.

Dear Sir:

Re: 16 Story Scandinavian-American Bank Bldg.

Confirming our verbal conversation of this morning, we will agree to furnish you with all of the "Millwork" for the above building (with the exception of Bank Quarters) and as per your plans and specifications, and the following understanding for the sum of Sixty-five Thousand Dollars (\$65,000.00) net cash.

It is understood by the above general term "Millwork" that we furnish no flooring, glass, or hardware, or metal covered work.

It is also understood that the material for the exterior window frames and sash shall be of V. G. Fir. The interior trim throughout to be of Philippine Mahogany, with the doors veneered with the harder species on stiles and rails, with panels of Honduras Mahogany.

It is our suggestion that the painter's priming be done by you at our factory, before delivery, as without this precaution we could not guarantee the work.

As to the terms of payment, we would expect 75% of the estimated value of the work delivered, or accepted for delivery, to be paid us on or before the 10th of the current month, for all of the previous month's work, and the balance of 25% retained to

be paid within 30 to 60 days of completion and acceptance of the entire contract. Bond to be furnished by Owner.

Respectfully submitted,

TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS, Jr. (Signed),

Mgr. [583]

Exhibit No. 152.

Being a contract similar to Exhibit 151, between the Scandinavian-American Building Company as party of the first part and Tacoma Millwork Supply Company as party of the second part and dated February 28th, 1920, with the following changes:

WHEREAS, The said Tacoma Millwork Supply Company is desirous of entering into a contract with the said Scandinavian-American Building Company, Owner, to furnish: All of the interior "Millwork" to be erected complete, according to the plans and specifications, for the sum of Thirty Thousand Dollars (\$30,000.00).

Also to furnish complete, the bucks, as per details, for the sum of Twelve Hundred Sixty-six Dollars (\$1266.00). All according to estimates furnished by the party of the second part, dated February 17th and 18th, 1920.

ART. I. That in consideration of the agreements herein contained the Owner agrees to pay to the Contractor the sum of Thirty-one Thousand Two Hundred Sixty-six Dollars (\$31,266.00) in installments as hereinafter stated. * * *

Although it is distinctly understood and agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible, yet for the convenience of the Contractor, it is stipulated that payments shall be made as follows:

75% monthly to be paid in cash, upon the 15th of each month provided estimates are furnished to the Architect on or before the first of each month, of the estimated value of the work delivered and erected, and the balance of 25% to be paid within thirty to sixty days, from completion and acceptance of the work and material covered by this contract.

ART. V. The said Contractor shall complete the several portions and the whole of the work comprehended under this agreement by [584] and at the time or times hereinafter stated, viz.:

All of the work aforementioned to be delivered and erected so that the whole can be completed within ten (10) months from date of this contract, and to be erected as fast as the building will permit.

ART. XIX. The Contractor shall upon request from the Owner, furnish forthwith a bond or bonds in form and substance and with surety satisfactory to the owner, in the sum of Fifteen Thousand (\$15,000) Dollars, conditioned for the true and

faithful performance of this contract on the part
of the Contractor. * * *

SCANDINAVIAN-AMERICAN BUILD-
ING CO.

By CHARLES DRURY,
Its President.

J. SHELDON,
Its Secretary.

TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS, Mgr.

G. L. DAVIS,
Contractor. [585]

EXHIBIT No. 152.

Feb. 17th, 1920.

Mr. Frederick Webber, Archt.

Tacoma, Wash.

Dear Sir:

Re: 16 Story Scandinavian-American Bank Bldg.,
Tacoma.

We will agree to furnish all of the labor and equipment necessary, to fully erect all of the "Mill-work" in the above building, as per your plans and specifications and in first-class shape, for the sum of Thirty Thousand Dollars (\$30,000.00). The fitting and placing of all hardware in the above "Mill-work" is included.

It is understood that the Owner will set the window frames, and furnish and set the door bucks and grounds.

The terms of payment to be as outlined in our
"Millwork" bid of even date.

Respectfully submitted,
TACOMA MILLWORK SUPPLY CO.
Accepted by FREDERICK WEBBER,
Archit.

Feb. 18, 1920.

Mr. Frederick Webber, Archit.

Tacoma, Wash.

Dear Sir:

Re: 16 Story Scandinavian-American Bank Bldg ,

We will agree to furnish you *will* all the door
bucks for the above building as per your plans, for
the sum of \$1,266.00.

We are also pleased to make you a price of \$8.00
per thousand lineal feet, on the $\frac{3}{4} \times 1\frac{5}{8}$ " plaster
grounds.

The door bucks will come plowed on the back, cut
to proper lengths, and notched for header.

Respectfully submitted,
TACOMA MILLWORK SUPPLY CO.
Accepted by FREDERICK WEBBER,
Archit. [586]

EXHIBIT No. 152.

Tacoma, Washington, Feb. 17, 1920.

Mr. Frederick Webber, Archit.

Tacoma, Washington.

Dear Sir:

Re: 16 Story Scandinavian-American Bank Build-
ing.

We will agree to furnish all of the labor and

equipment necessary to *full* erect all of the "Millwork" in the above building, as per your plans and specifications and in first-class shape, for the sum of Thirty Thousand Dollars (\$30,000.00). The fitting and placing of all hardware on the above "Millwork" is included.

It is understood that the "Owner" will set the window frames, and furnish and set the door-bucks and grounds.

The terms of payment to be as outlined in our "Millwork" bid of even date.

Bond to be paid by Owner.

Respectfully submitted,
TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS, Jr. (Signed),
Mgr.

Feb. 18, 1920.

Mr. Frederick Webber, Archt.

Tacoma, Washington.

Dear Sir:

Re: 16 Story Scandinavian-American Bank Building.

We will agree to furnish you all of the door bucks for the above building, as per your plans, for the sum of \$1266.00.

We are also pleased to make you a price of \$8.00 per lineal thousand feet, on the $\frac{3}{4} \times 1\frac{5}{8}$ " plaster Grounds.

The door bucks will come plowed on the back, cut to proper lengths, and notched for header.

Respectfully submitted,

TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS, Jr. (Signed),
Mgr.

Bond to be paid by Owner. [587]

Exhibit No. 153.

Being a contract similar to Exhibit 151, between the Scandinavian-American Building Company as party of the first part and Tacoma Millwork Supply Company as party of the second part and dated February 28th, 1920, with the following changes:

WHEREAS, The said Tacoma Millwork Supply Co. is desirous of entering into a contract with the said Scandinavian-American Building Company, to furnish: The exterior window frames, together with the transom sash, for the first floor Banking Quarters, as per the plans and details, for the sum of Nineteen Hundred Fifty-seven Dollars (\$1957.00). Also to furnish labor of fitting the sash in the frames and putting on the interior mouldings, at an extra cost of \$171.00, all as per estimates of Feb. 25th, attached hereto.

ART. I. That in consideration of the agreements herein contained the Owner agrees to pay to the Contractor the sum of Two Thousand One Hundred Twenty-eight (\$2,128.00) Dollars in installments as hereinafter stated. Said payments, however, in no way lessening the total and final responsibility of the Contractor. No payment shall be construed or considered as an acceptance of any

defective work or improper material. Although it is distinctly understood and agreed by and between the parties hereto that this contract is a whole contract, and not severable or divisible, yet for the convenience of the Contractor, it is stipulated that payments shall be made as follows: 75% monthly to be paid in cash, upon the 15th of each month, provided estimates are furnished to the Architect, on or before the first of each month, of the estimated value of the work delivered and erected, and the balance of 25% to be paid within 30 to 60 days from completion and acceptance of the "Millwork" and erection covered by this contract. [588]

ART. V. The said Contractor shall complete the several portions and the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz.:

All of the work aforementioned to be delivered and erected so that the whole can be completed within ten (10) months from the date of this contract, and to be delivered and erected as fast as the building will permit. * * *

SCANDINAVIAN-AMERICAN BUILD-
ING CO.

By CHARLES DRURY,
Its President.

J. SHELDON,
Its Secretary.

TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS, Jr.
G. L. DAVIS, (Signed),
Contractor. [589]

EXHIBIT No. 153.

Tacoma, Washington, Feb. 25, 1920.

Mr. Frederick Webber, Archt.,

Tacoma, Wash.

Dear Sir:

Re: 16 Story Scandinavian-Bank Bldg.

We will agree to furnish you with the exterior window frames, together with the transom sash, for the first Floor Banking Quarters, as per the plans and our details, for the sum of \$1957.00. This, of course, included no glass, no setting of frames or labor erecting. However, we estimate the labor of fitting the sash in the frames and putting on the interior mouldings at \$171.00, making a total of \$2128.00.

Respectfully yours,

TACOMA MILLWORK SUPPLY CO.,

By R. T. DAVIS, Jr.,

Manager. [590]

Exhibit No. 154.

Sold to:

SCANDINAVIAN-AMERICAN BANK BUILDING CO., CITY.

All material MAHOGANY except where specified differently.

EXHIBIT "A"-1.

Key:

C. W.—Complete in Warehouse.

C. F.—Complete in Factory.

C. W. 18000 lft. mahogany base $\frac{5}{8} \times 7\frac{3}{4}$ @ .50..... 9000.No. 18000 " " base mold $\frac{3}{4} \times 2$ Claim 18000 " " base shoe $\frac{3}{8} \times 1\frac{5}{8}$ C. W. 1000 pes. 7-8 door casing $13/16 \times 4\frac{1}{2}$

C. W. 800 " 9-0 " " " " "

C. W. 900 " 4-0 " " " " "

19600 Lin. ft. @ .40..... 7840.

C. F. 900 pes. 7-3 door stops $\frac{3}{4} \times 2$

C. F. 650 " 3-4 " " " " "

C. F. 400 " 1-5 " " " " "

10600 Lin. ft. @ .20..... 2120.

C. F. 400 pes. 8-10 Door Jambs $1\frac{7}{16} \times 5\frac{5}{8}$ net

C. F. 500 " 7-4 " " " " "

C. F. 450 " 3-4 " " " " "

9400 Lin. ft. @ .50..... 4700.

C. F. 200 pes. 3-4 mahogany trans. bar $1\frac{13}{16} \times 5\frac{5}{8}$

@ 2.25 ea..... 450.

C. F. 322 pes. 10-5 window head casing $13/16 \times 4\frac{1}{2}$

C. F. 45 " 9-10 " " " " "

C. F. 28 " 9-0 " " " " "

C. F. 39 " 5-0 " " " " "

4828 Lin. ft. @ .40..... 1931.20

C. F. 38 pes. 9-10 Window side casing $13/16 \times 4\frac{1}{2}$

C. F. 830 " 7-4 " " " " "

7020 Lin. ft. @ .40..... 2808.

No.

Claim 19 pes. 9-4 mullion panelled casing made up in shop

" 451 " 7-0 " " " " " "

No.	322	pes.	10-6	window stools	1 1/8				
Claim	45	"	9-11	"	"	"	"	"	"
No.	28	"	9-0	"	"	"	"	"	"
Claim	39	"	5-2	"	"	"	"	"	"
C. W.	322	"	10-6	window apron	3/4 x 3 1/2				
C. W.	45	"	9-11	"	"	"	"	"	"
C. W.	28	"	9-0	"	"	"	"	"	"
C. W.	39	"	5-2	"	"	"	"	"	"
4828 Lin. ft. @ .25..... 1207.									
C. F.	352	pes.	11-0	cove mold	1/2 x 5/8				
C. F.	45	"	10-0	"	"	"	"	"	"
C. F.	28	"	9-0	"	"	"	"	"	"
C. F.	39	"	5-2	"	"	"	"	"	"
5160 Lin. ft. @ .05..... 258.									
C. F.	38	pes.	9-4	back casing	3/4 x 2 3/8				
C. F.	830	"	6-10	"	"	"	"	"	"
6190 Lin. ft. @ .18..... 1114.20									
No.									
Claim	38	pes.	9-4	sub-jambs	3/4 x				
"	830	"	6-10	"	"	"	"	"	"
[591]									
No.	322	pes.	9-8	head sub-jambs					
Claim	45	"	9-2	"	"	"	"	"	"
No.	28	"	8-0	"	"	"	"	"	"
Claim	39	"	4-4	"	"	"	"	"	"
C. F.	76	pes.	9-2	window stops—hollow back	5/8 x 2				
C. F.	780	"	6-10	"	"	"	"	"	"
C. F.	138	"	2-4	"	"	"	"	"	"
C. F.	39	"	4-0	"	"	"	"	"	"
C. F.	700	"	4-6	"	"	"	"	"	"
C. F.	44	"	3-8	"	"	"	"	"	"
10466 Lin. ft. @ .18.....1883.88									
C. F.	8	"	10-5	window head casing	3/4 x 4 1/2	fir			
C. F.	3	"	9-10	"	"	"	"	"	"
C. F.	20	"	7-4	window side casing	3/4 x 4 1/2	fir			
C. F.	4	"	10-0	"	"	"	"	"	"

No.	11	"	7-0 window mullion casing $\frac{3}{4}$ x 4 made up fir	
Claim	3	"	9-11 window stool $1\frac{1}{8}$ fir	
No.	6	"	10-6 " " " "	
Claim	2	"	5-6 " " " "	
C. W.	3	pes.	10-0 window apron $\frac{3}{4}$ x $3\frac{1}{2}$ fir	
C. W.	6	"	10-6 window apron $\frac{3}{4}$ x $3\frac{1}{2}$ "	
C. W.	2	"	5-6 " " " " "	
			114 Lin. ft. @ .08.....	9.12
C. W.	20	pes.	6-10 Black casing fir	
			140 Lin. ft. @ .08.....	11.20
No.	20	pes.	6-10 sub-jambs fir	
Claim	11	"	9-8 head sub-jambs fir	
C. F.	22	"	6-10 window stops $\frac{5}{8}$ x 2 fir	
C. F.	11	"	4-6 " " " " "	
			209 Lin. ft. @ .08.....	16.72

WOOD FRAMES FOR BANK BUILDING. FIR

In building	16	Mullion frames	9-4 $\frac{3}{4}$ x 9-3 $\frac{1}{4}$ OSM of frame	
691 Openings	3	" "	8-10 x 9-3 $\frac{1}{4}$ " "	
In Warehouse	36	" "	8-10 x 7-0 $\frac{1}{4}$ " "	
238 Openings	22	" "	7-9 $\frac{1}{2}$ x 7-0 $\frac{1}{4}$ " "	
929	"	227	" "	9-4 $\frac{3}{4}$ x 7-0 $\frac{1}{4}$ " "
"	"	2	" "	9-4 $\frac{3}{4}$ x 7-0 $\frac{1}{4}$ with door opening
"	"	60	Triple frames	9-4 $\frac{3}{4}$ x 7-0 $\frac{1}{4}$ OSM of frame
"	"	9	" "	8-10 x 7-0 $\frac{1}{4}$ " "
"	"	26	Mullion frames	9-4 $\frac{3}{4}$ x 7-0 $\frac{1}{4}$ " "
"	"	6	Triple frames	7-9 $\frac{1}{2}$ x 7-0 $\frac{1}{4}$ " "
"	"	39	Single frames	4-0 $\frac{1}{4}$ x 7-0 $\frac{1}{4}$ " "
446 frames making 929 Openings @ \$10.00 ea.....				9290.00

WINDOWS. FIR

All complete	32	windows	4-3 x 8-10 $\frac{7}{8}$
977 pcs in	6	"	3-11 $\frac{5}{8}$ x 8-10 $\frac{7}{8}$
Warehouse	452	"	4-3 x 6-7 $\frac{7}{8}$
nearly complete	72	"	3-11 $\frac{5}{8}$ x 6-7 $\frac{7}{8}$

847 pes. in factory 44 " 3-5 $\frac{3}{8}$ x 6-7 $\frac{7}{8}$

In factory 75 " 3-7 x 6-7 $\frac{7}{8}$

[592]

EXHIBIT "A"-1.

All complete 120 windows 2-1 $\frac{3}{4}$ x 6-7 $\frac{7}{8}$

977 pes. in 18 " 22 $\frac{3}{8}$ x 6-7 $\frac{7}{8}$

Warehouse 12 " 16 $\frac{1}{8}$ x 6-7 $\frac{7}{8}$

Nearly complete 52 " 4-3 x 6-7 $\frac{7}{8}$

847 pes. in 39 " 3-9 x 6-7 $\frac{7}{8}$

Factory—

in factory.

924 Windows or 1824 pes. of sash @ \$3.50 ea..... 6384.00

DOORS. MAHOGANY

Nearly 200 doors 3-0 x 7-0 x 2 mahogany 1 light glass

Complete @ \$20.00 4000.00

in factory 250 " 3-0 x 7-0 x 2 mahogany 1 panel

@ \$20.00 5000.00

200 mahogany transom sash 3-0 x 1-3 x 1 $\frac{3}{4}$

1 light @ \$2.25..... 500.00

\$58555.92

NOTE: Prices set opposite last three items are for cost as far as completed only.

[593]

Sold to:

SCANDINAVIAN-AMERICAN BANK BUILDING COMPANY, CITY.

EXHIBIT "B"-1.

C. F. 400 pes. 8-11 Common fir door bucks, 21 $\frac{1}{2}$ x 5 $\frac{5}{8}$

500 " 7-4 " " " " "

450 " 3-10 " " " " "

Above material as per contract..... 1266.00

[594]

Sold to:

SCANDINAVIAN-AMERICAN BANK BUILDING COMPANY, CITY.

All material to be mahogany unless otherwise specified.

EXHIBIT "C"-1.

BANKING ROOM FRAMES.

All complete	2	frames	8-4 $\frac{1}{8}$ x 19-3	OSM	trans.	4-6 $\frac{3}{8}$	fir
11 in Bldg.	4	"	9-3 x 19-3	"	"	"	"
9 in factory	2	"	7-9 $\frac{1}{8}$ x 19-3	"	"	"	"
" "	4	"	8-1 x 19-3	"	"	"	"
" "	2	"	7-5 $\frac{3}{4}$ x 19-2	"	"	"	"
" "	1	"	7-6 $\frac{1}{4}$ x 19-3	"	"	"	"
" "	2	transom frames	9-3 x 5-0	sash	4-6 $\frac{3}{8}$	high	fir
" "	1	"	8-4 $\frac{1}{8}$ x 5-0	"	"	"	"
" "	1	triple	8-4 $\frac{1}{8}$ x 6-3	sash	2-6 $\frac{3}{8}$ x 5-9 $\frac{1}{8}$	fir	
" "	1	"	8-4 $\frac{1}{8}$ x 5-6	"	2-6 $\frac{3}{8}$ x 5-0 $\frac{1}{8}$	"	

BANKING ROOM WINDOW TRIM.

C. F.	30	pes.	16-0	inside	stops	15/16 x 2 $\frac{5}{8}$	mahogany
C. F.	36	"	5-0	"	"	"	"
C. F.	6	"	6-6	"	"	"	"
C. F.	6	"	5-6	"	"	"	"
C. F.	27	"	8-6	"	"	"	"
C. F.	19	"	9-6	"	"	"	"
C. F.	12	"	7-9	"	"	"	"
C. F.	8	"	8-0	"	"	"	"
C. F.	30	pes.	20-0	jamb	casing	1 1/16 x 1 1/16	S4S mahogany
C. F.	6	"	5-0	"	"	"	"
C. F.	2	"	5-6	"	"	"	"
C. F.	2	"	6-6	"	"	"	"
C. F.	5	"	8-9	"	"	"	"
C. F.	4	"	8-6	"	"	"	"
C. F.	2	"	8-2	"	"	"	"
C. F.	3	"	8-0	"	"	"	"
C. F.	6	"	9-8	"	"	"	"

C. F.	2	pcs.	8-0	1 1/16 x 3 9/16	S4S	mahogany	
C. F.	4	"	8-3	"	"	"	"
C. F.	2	"	8-6	"	"	"	"
C. F.	3	"	7-9	"	"	"	"
C. F.	4	"	9-6	"	"	"	"
C. F.	5	pcs.	8-9	1 1/16 x 2	S4S	mahogany	
C. F.	4	"	8-6	"	"	"	"
C. F.	2	"	8-2	"	"	"	"
C. F.	3	"	7-10	"	"	"	"
C. F.	6	"	9-8	"	"	"	"
C. F.	30	pcs.	20-0	mahogany bed mold		1 11/16 x 1 3/4	
C. F.	6	"	5-0	"	"	"	"
C. F.	2	"	5-6	"	"	"	"
C. F.	2	"	6-6	"	"	"	"
C. F.	10	"	8-9	"	"	"	"
C. F.	8	"	8-6	"	"	"	"
C. F.	4	"	8-4	"	"	"	"
C. F.	6	"	8-0	"	"	"	"
C. F.	3	"	10-0	"	"	"	"

Material as above and on preceding sheet..... 1957.00

Banking rooms—

Sold to:

SCANDINAVIAN-AMERICAN BANK BUILD-
ING COMPANY, CITY.

EXHIBIT "D"—1

LABOR CONTRACT ON BUILDING.

Mitering, gluing up, smoothing off and making rabbet for base on 900 sides door casing @ \$2.00	1800.00
Mitering up, gluing up and smoothing off 39 sides window casing @ \$2.00	78.00
Mitering and smoothing off 405 sides win- dow casing @ \$2.00	810.00
Fitting 1848 pieces of sash into frames and preparing for hardware @ \$1.50.....	2772.00
Squaring ends of 180,000 feet of base, and working tongue on ends @ .02¢ per foot	360.00
Work on 446 aprons, returning molding on ends and bringing to exact lengths @ .50 each	223.00
	<hr/>
	\$643.00

[596]

Sold to:

SCANDINAVIAN-AMERICAN BUILDING
COMPANY, CITY.

EXHIBIT "E"—1.

EXTRA: Not on contract.

80 pcs. scaffold bucks	\$200.00
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[597]

Sold to:

SCANDINAVIAN-AMERICAN BUILDING
COMPANY, CITY.

EXHIBIT "F"—1.

EXTRA: Not on contract.

40 pcs. wedges 4"x6"x18" \$8.00
[598]

Sold to:

SCANDINAVIAN-AMERICAN BUILDING
COMPANY, CITY.

EXHIBIT "G"—1.

To premium on Contractor's surety Bonds to be
paid for by Owner as per agreement .. \$718.41
[599]

SUMMARY.

Exhibit "A"	58555.92	
" "B"	1266.00	
" "C"	1957.00	
" "D"	6043.00	
" "E"	200.00	
" "F"	8.00	
" "G"	718.41	
	<hr/>	
	68748.33	
Credits May 14, 1920	\$ 8.00	
" Aug. 16, 1920	5100.00	
" Sept. 18, 1920	1132.50	
	<hr/>	
	6240.50	
Total credits.....	6240.50	
Balance due		62,507.83
Profit entitled to on balance of "Labor Contract".....		6,000.00
Profit entitled to on balance of "Main Contract".....		1,000.00
		<hr/>
[599½]		69,507.83

Exhibit No. 167.**TACOMA MILLWORK SUPPLY CO.**

Tacoma, Wash., Dec. 27, 1920.

Scandinavian-American Building Co.,

Argonne Building,

Tacoma, Wash.

Att.: Mr. Sherman Wells.

Dear Sir:

We wish to inquire if you can kindly offer us any relief in the matter of taking delivery of part of the exterior window frames, out of storage, this week. While we know this will doubtless be inconveniencing you, to some extent, with the building in present condition, it is, on the other hand, working a hardship on us for the reason that we are compelled to pay a rental of \$150.00 per month on part of the frames which we have on the lower floor of the warehouse. This, of course, is rapidly eating us up. We do not mind retaining one floor for storage, and while we realize it is a matter of merely our own concern to maintain warehouse space, still we know you will appreciate the fact that delivery of the frames to the building has been greatly delayed, through no fault of ours. In fact our contract time on the entire building is now about up. So we thought with these points in view you would doubtless be very glad to do the very best you can, under the circumstances, toward taking delivery of some of the frames and, if so, we would like to get them moved out this week, to avoid another month's rent, if possible,

so kindly let us have your disposition in the matter,
and [600] greatly oblige,

Yours respectfully,

TACOMA MILLWORK SUPPLY CO.,

By R. T. DAVIS, Jr.

M. D.

SCANDINAVIAN-AMERICAN BUILDING CO.

Tacoma, Washington.

December 30, 1920.

Tacoma Millwork Supply Co.,

City.

Gentlemen:

In answer to yours of December 27th in reference to taking part of the exterior window frames out of storage this week, I have given this matter consideration and I cannot see our way clear to receive any frames at the job right away. I had been in hopes of being able to handle four floors of frames by this time, but owing to the shortage of riveters the steel erector has not been able to get out of the way. I hope to have room for part of the frames by the 15th of January and if I can see my way clear sooner I will advise you.

Very truly yours,

SCANDINAVIAN-AMERICAN BUILDING CO.

By SHERMAN WELLS,

Superintendent.

SW. C. [601]

Exhibit No. 168.**TACOMA MILLWORK SUPPLY CO.**

Tacoma, Wash., March 8, 1921.

Mr. F. P. Haskell, Jr.,

Receiver for Scandinavian-American Building
Co.,

Tacoma, Washington.

Dear Sir:

Inasmuch as you are the Receiver for the above-mentioned Building Company, we think you should have sole custody of the warehouse at 2140-42 Pacific Avenue, second floor, which we have rented through an understanding with the Building Company for delivery of our goods pending completion of the building to a point where they could take care of the goods without damage from the weather.

There is a considerable quantity, as you will find, of sash, frames, and mahogany base, casing, etc. in this warehouse.

We have heretofore paid \$100.00 per month to W. H. Opie & Co., agents, for rental, in addition to paying light and water charges, on a month to month basis.

Inasmuch as this material has automatically come under your jurisdiction, we wish to tender you herewith the key to same.

Yours respectfully,

TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS, Jr.,

Manager. [602]

EXHIBIT No. 168 (Con.)

March 8, 1921.

Tacoma Millwork Supply Company,
Center & Alaska Streets,
Tacoma, Washington.

Gentlemen:

Your letter dated March 8th together with a key, was brought into the bank this morning, and laid on my desk by your Assistant Manager. This warehouse, together with its contents, never has been under the jurisdiction of the Scandinavian-American Building Company and is not now and never has been under my jurisdiction as Receiver of the Building Company. Inquiry develops the fact that you have rented the building yourself, have paid the rent and have kept the property insured against loss by fire. Not only that, you were to deliver the material to the building site as soon as it was required in the construction of the building.

I shall not attempt to take possession of the property and I return to you herewith the key which was left on my desk this morning.

Very truly yours,

F. P. HASKELL, Jr.,

Special Deputy Bank Commissioner.

GEK/H. [603]

Exhibit No. 170.**TACOMA MILLWORK SUPPLY COMPANY.**

Tacoma, Wash. July 30, 1920.

Sold to—Scandinavian-American Building Co., Argonne Bldg., City.

Shipped to—storeroom at 2140 Pacific Ave.

680 Window Frame openings in storage

at 2140 Pacific Ave. \$6800.00

Pay 75% as per

ENTERED

Contract balance

D. B. 8/4—130

in 30 & 60 days

I. R. Page 20

\$5,100 Paid by check #449 8/16.

O. K.—S. WELLS.

FARRINGTON & BARNUM,

Auditors.

W. N. M. [604]

Exhibit No. 171.**TACOMA MILLWORK SUPPLY COMPANY.**

Tacoma, Wash., Aug. 23, 1920.

Sold to—Scandinavian-American Bldg. Co., Tacoma, Wash.

Shipped to—warehouse at 2140 Pacific Ave., City.

16 Mullion wd. frames 9-4³/₄x9-3¹/₄3 Mullion wd. frames 8-10x9-3¹/₄36 Mullion wd. frames 8-10x7-0¹/₄22 Mullion wd. frames 7-9¹/₂x7-0¹/₄226 Mullion wd. frames 9-4³/₄x7-0¹/₄60 Triple wd. frames 9-4³/₄x7-0¹/₄

9 Triple wd. frames 8-10x7-0 $\frac{1}{4}$
6 Triple wd. frames 7-9 $\frac{1}{2}$ x7-0 $\frac{1}{4}$
Total 831 openings
Less 680 openings Billed July 30-'20

151 openings @ \$10.00 \$1510.00
Pay 75%.

ENTERED

D. B. 8/23—146.

I. R. Page 25.

Sep. 18, 1920.

Ck. 502.

1132.50.

O. K.—S. WELLS. [605]

Exhibit No. 172.

NOTICE OF CLAIM OF LIEN.

State of Washington,
County of Pierce,—ss.

ANN DAVIS and R. T. DAVIS, Jr., as Executors
of the Estate of R. T. DAVIS, Deceased;
R. T. DAVIS, Jr., LLOYD DAVIS,
HARRY L. DAVIS, MAUDE DAVIS,
MARIE A. DAVIS, RUTH G. DAVIS,
HATTIE DAVIS TENNANT and ANN
DAVIS, Copartners Doing Business Under
the Name and Style of Tacoma Millwork &
Supply Company,

Claimant,

vs.

SCANDINAVIAN-AMERICAN BUILDING CO.

NOTICE OF CLAIM OF LIEN OF LABORER AND MATERIALMAN.

NOTICE IS HEREBY GIVEN that Tacoma Millwork & Supply Co., a partnership above described, did on the 28th day of February, 1920, at the request of Scandinavian-American Building Company, commence to furnish material and perform labor upon that certain building or structure situated upon the following described land, to wit: Lots Ten (10), Eleven (11) and Twelve (12) in Block One Thousand and Three (1003), as the same are shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," which was filed for record in the office of the auditor of Pierce County, Washington Territory, February 3, 1875, in Pierce County, State of Washington.

That Scandinavian-American Building Co. is now and at all times herein mentioned has been, the owner and reputed owner of the said land and the said building or structure situated thereon, for the construction of said building or structure and for the ordering of material and labor therefor.

That all of said land hereinabove described is necessary for the convenient use and occupation of the said building or structure.

That the furnishing of said material and the performance of said labor ceased on the 17th day of January, 1921.

That the value of said material and labor was and is \$—, no part of which has been paid except the sum of \$—; that the claimant, the undersigned, claims a lien upon said building and struc-

ture above described and the land upon which the same is situated as above described for the sum of \$——, the amount still due for said labor and material; that of the sum still remaining due the sum of \$—— is for labor and the sum of \$—— is for material furnished as aforesaid. That the foregoing lien is based upon an erection contract dated February 28, 1920, between claimant and said Scandinavian-American Building Company, involving a total of \$30,000 for the erection of certain millwork described in said contract; to be placed in the building situated upon the property above mentioned, and that the owner has refused to continue said work although a great portion has been made up especially for easy and efficient erection, and a reasonable profit from said contract is and would have been the sum of \$10,500, and that the said sum is now owing claimant hereunder. [606]

State of Washington,
County of Pierce,—ss.

R. T. Davis, being sworn says: I am the manager and a partner of Tacoma Millwork Supply Co., claimant above named; I have heard the foregoing claim read and know the contents thereof and believe the same to be just.

R. T. DAVIS, Jr.

Subscribed and sworn to before me this 14th day of January, 1921.

H. J. DOTEN,
Notary Public in and for the State of Washington,
Residing at Tacoma, County and State Aforesaid.

585425. Notice of Claim of Lien—Laborer or Materialman. Filed for Record at Request of Tacoma Millwork Supply Co., Jan. 10, 1921, at 33 minutes past 4 P. M., and Recorded in Volume 15 of Liens, Page 629, Records of Pierce County, State of Washington. C. A. Campbell, Auditor of Said County. By A. L. Kelly, Deputy.

Exhibit No. 173.

NOTICE OF CLAIM OF LIEN.

State of Washington,
County of Pierce,—ss.

ANN DAVIS and R. T. DAVIS, Jr., as Executors
of the Estate of R. T. DAVIS, Deceased;
R. T. DAVIS, Jr.; LLOYD DAVIS;
HARRY L. DAVIS; MAUDE A. DAVIS;
MARIE A. DAVIS; RUTH G. DAVIS;
HATTIE DAVIS TENNANT and ANN
DAVIS, Copartners Doing Business Under
the Name and Style of Tacoma Millwork
Supply Company,

Claimant,

vs.

**SCANDINAVIAN-AMERICAN BUILDING CO.
NOTICE OF CLAIM OF LIEN OF LABORER
AND MATERIALMAN.**

NOTICE IS HEREBY GIVEN that Tacoma Millwork & Supply Co., a partnership as above described, did on the 28th day of February, 1920, at the request of Scandinavian-American Building Company commence to furnish material and perform la-

bor upon that certain building or structure, situated upon the following described land, to wit: Lots Ten (10), Eleven (11) and Twelve (12) in Block One Thousand and Three (1003), as the same are shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," which was filed for record in the office of the auditor of Pierce County, Washington Territory, February 3, 1875, in Pierce County, State of Washington.

That Scandinavian-American Building Co. is now and at all times herein mentioned has been, the owner and reputed owner of the said land and the said building or structure situated thereon, for the construction of said building or structure and for the ordering of material and labor therefor.

That all of said land hereinabove described is necessary for the convenient use and occupation of the said building or structure.

That the furnishing of said material and the performance of said labor cease on the 17th day of January, 1921.

That the value of said material and labor was and is \$——, no part of which has been paid except the sum of \$——; that the claimant, the undersigned, claims a lien upon said building and structure above described and the land upon which the same is situated as above described for the sum of \$——, the amount still due for said labor and material; that of the sum still remaining due the sum of \$—— is for labor and the sum of \$—— is for material furnished as aforesaid.

That the foregoing involved a building contract

for furnishing of millwork at a total of \$65,000.00, on which deliveries have been made in the approximate amount of \$44,000.00, still unpaid, and that the balance of said contract would if claimant had been permitted to complete it have netted him a profit of \$3,000.00, which is now due claimant.

TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS, Jr.,

Mgr. [607]

State of Washington,
County of Pierce,—ss.

R. T. Davis, Jr., being sworn says: I am the manager and one of the parties of Tacoma Millwork & Supply Co., a partnership, claimant above named; I have heard the foregoing claim read and know the contents thereof and believe the same to be just.

R. T. DAVIS, Jr.

Subscribed and sworn to before me this 19th day of January, 1921.

H. J. DOTEN,

Notary Public in and for the State of Washington,
Residing at Tacoma, County and State Aforesaid.

585424. Notice of Claim of Lien—Laborer or Materialman. Filed for Record at Request of Tacoma Millwork & Supply Co., Jan. 19, 1921, 32 minutes past 4 P. M., and Recorded in Volume 15 of Liens, Page 628, Records of Pierce County, State of Washington. C. A. Campbell, Auditor of said County. By A. L. Kelly, Deputy.

Exhibit No. 174.

NOTICE OF CLAIM OF LIEN.

State of Washington,
County of Pierce,—ss.

ANN DAVIS and R. T. DAVIS, Jr., as Executors
of the Estate of R. T. DAVIS, Deceased;
R. T. DAVIS, Jr., LLOYD DAVIS;
HARRY L. DAVIS; MAUDE A. DAVIS;
MARIE A. DAVIS; RUTH C. DAVIS;
HATTIE DAVIS TENNANT and ANN
DAVIS, Copartners Doing Business Under
the Name and Style of Tacoma Millwork
Supply Company,

Claimant,

vs.

SCANDINAVIAN-AMERICAN BUILDING
CO., a Corporation, et al.

**NOTICE OF CLAIM OF LIEN OF LABORER
AND MATERIALMAN.**

NOTICE IS HEREBY GIVEN that Tacoma
Millwork & Supply Co., a partnership, above de-
scribed, did on the 28th day of February, 1920, at
the request of Scandinavian-American Building
Company, commence to furnish material and per-
form labor upon that certain building or structure,
situated upon the following described land, to wit:
Lots Ten (10), Eleven (11), and Twelve (12), in
Block One Thousand and Three (1003), as the same
are shown and designated upon a certain plat enti-

tled "Map of New Tacoma, W. T.," which was filed for record in the office of the auditor of Pierce County, Washington Territory, February 3, 1875, in Pierce County, State of Washington.

That Scandinavian-American Building Co. is now and at all times herein mentioned has been, the owner and reputed owner of the said land and the said building or structure situated thereon, for the construction of said building or structure and for the ordering of material and labor therefor.

That all of said land hereinabove described is necessary for the convenient use and occupation of the said building or structure.

That the furnishing of said material and the performance of said labor ceased on the 17th day of January, 1921.

That the value of said material and labor was and is \$75,748.33, no part of which has been paid except the sum of \$6,240.50; that the claimant, the undersigned, claims a lien upon said building and structure above described and the land upon which the same is situated as above described for the sum of \$69,507.83, the amount still due for said labor and material; that of the sum still remaining due the sum of \$6,043.00 is for labor and the sum of \$63,464.83 is for material furnished as aforesaid, with this qualification: That in said balance now designated as and for material said balance contains a profit amount of \$6,000 on the labor or erection contract, and contains also a profit amount of \$1,000 upon the main millwork contract, and said balance likewise contains certain percentages of labor that

are customary and usual in the manufacturing of such millwork, being the factory labor represented in the finished product which has not been segregated, in that practically all of said balance after deducting said \$7,000 just mentioned is made up of contract work, the price for which was agreed upon.

TACOMA MILLWORK SUPPLY CO.

By R. T. DAVIS, Jr.,
Mgr. [608]

State of Washington,
County of Pierce,—ss.

R. T. Davis, Jr., being sworn says: I am the manager and one of the partners of Tacoma Millwork Supply Company, a partnership, claimant above named; I have heard the foregoing claim read and know the contents thereof and believe the same to be just.

R. T. DAVIS, Jr.

Subscribed and sworn to before me this 7th day of April, 1921.

FRANK C. NEAL,
Notary Public in and for the State of Washington,
Residing at Tacoma, County and State Aforesaid.

593021. Filed by Flick & Paul. April 7, 1921.
Lien Record 16, Page 63, at 2:37 P. M. C. A.
Campbell, County Auditor, Pierce County. Wash.
By A. L. Kelly, Deputy.

Exhibit No. 176.**TACOMA MILLWORK SUPPLY COMPANY.**

Tacoma, Wash., Jan. 6, 1921.

Sold to Scandinavian-American Bldg. Co.,
Argonne Bldg., City.

Shipped to warehouse at 2142 Pacific Ave.,
City.

812 pes. sash \$2842.00

Estimate on contract. [609]

EXHIBIT No. 176.**TACOMA MILLWORK SUPPLY COMPANY.**

Tacoma, Wash., Jan. 6, 1921.

Sold to Scandinavian-American Bldg. Co.,
Argonne Bldg., City.

Shipped to Bank Bldg., at 11th & Pacific
Ave.

To estimate on exterior window frames for

Banking Quarters \$1400.00

FARRINGTON & BARNUM, INC.,

Auditors.

W.N. M. [610]

EXHIBIT No. 176.**TACOMA MILLWORK SUPPLY COMPANY.**

Tacoma, Wash., Dec. 31, 1920.

Sold to Scandinavian-American Bldg. Co.,
Argonne Bldg., City.

Shipped to warehouse at 2142 Pacific Ave.

ON CONTRACT.

18000 1ft. Mahogany base	\$7200.00
445 pcs. window apron	2002.50
	<hr/>
	9202.50

FARRINGTON & BARNUM, INC.,
Auditors.
W. N. M. [611]

EXHIBIT No. 176.

TACOMA MILLWORK SUPPLY COMPANY.

Tacoma, Wash., Dec. 31, 1920.

Sold to—Scandinavian-American Bldg. Co., Ar-
gonne Bldg., City.

Shipped to—Warehouse at 2142 Pacific Ave.,

ON CONTRACT.

18000 1ft. Mahogany base	\$7200.00
445 pcs. window apron	2002.50
	<hr/>
	\$9202.50

FARRINGTON & BARNUM, INC.,
Auditors.
W. N. M. [612]

Exhibit No. 191.

Tacoma, Washington, February 23d, 1920.

Mr. Frederick W. Webber,
Room 143, Tacoma Hotel,
Tacoma, Washington.

Dear Sir:

We herewith beg to enclose five copies of the

agreement in the form arranged between yourself and the writer yesterday.

Kindly have them signed and the writer will call for a copy late this afternoon.

We have commenced to design the dies and will put the work in hand immediately. We will be ready with the material before you actually require it.

Thanking you for the business and promising you our full co-operation, we are,

Very truly yours,

FAR WEST CLAY COMPANY.

By A. G. CRAIG. (Signed)

AGC. [613]

Exhibit No. 192.

February 25th, 1920.

Mr. Frederick Webber,
Tacoma Hotel,
Tacoma, Washington.

Dear Sir:

I am directed by the Washington Brick, Lime & Sewer Pipe Company to forward you the enclosed five copies of proposed contract between the Scandinavian-American Building Company and the Washington Brick, Lime & Sewer Pipe Company, which have been executed on behalf of the Washington Brick, Lime and Sewer Pipe Company.

You will note that a new section 5½, has been added and section 14 eliminated. This, I under-

stand, is in conformity with the oral agreement made with Mr. Piollet.

Yours very truly,
CHAS. P. LUND.

CPL: MCM.

Encs. (5). [614]

EXHIBIT No. 192.

Tacoma, Washington, February 19th, 1920.

Mr. Frederick Webber,
Tacoma, Washington.

Dear Sir:

We propose to furnish the Architectural Terra Cotta for the proposed 16-story Scandinavian-American Bank Building for the Scandinavian-American Bank Building Company, which it is proposed to erect at Eleventh Street and Pacific Avenue, Tacoma, Washington, for the sum of One Hundred Nine Thousand (\$109,000) Dollars.

This bid covers the exterior facing shown on the plans as Indiana Limestone from the top of that point shown on the plans as 10 cut hammered granite to top of pent house, four sides of building.

It also includes the part on the alley elevation marked as 10 cut hammered granite, as Ashlar Terra Cotta.

We agree to give you free of charges the services of an experienced Terra Cotta setter and fitter.

This price of \$109,000 is for delivery at building site.

We are in position to make deliveries as outlined by you.

Very truly yours,

WASHINGTON BRICK, LIME &
SEWER PIPE CO.

By V. E. PIOLLET,
Vice-president. [615]

**Testimony of M. L. Bryan, for Washington Brick,
Lime & Sewer Pipe Company.**

M. L. BRYAN, a witness called and sworn on behalf of the Washington Brick, Lime & Sewer Pipe Co., testified as follows:

Direct Examination.

(By Mr. LUND.)

I am superintendent of the terra cotta department of the Washington Brick, Lime & Sewer Pipe Company, and was in 1920; I am familiar with the contract between this company and the Scandinavian-American Building Company, for terra cotta.

The processes of terra cotta manufacture originates with original drawings prepared by the architect; after the plans are drawn, they are sent to the terra cotta manufacturer for figuring and interpretation upon which an estimate is made and a bid made for the material. After the awarding of the contract, the architect is supposed to furnish complete information whereby we can take his drawings and joint them, make the pieces and the sizes which are technically possible, arrange for the pieces to fit, and for the anchoring, all of which information we put on our drawings and send to

(Testimony of M. L. Bryan.)

the architect for his approval which we have to get after preparing our plans. After the drawings are approved by the architect, we make a schedule of the different kinds and classes of pieces on that building and then make plaster paris models of each one of those units from which a plaster paris mold is made wherein we can duplicate as many pieces in clay as necessary to complete the schedules. The molds after being made go to a department which we call the preserving department and the clay is then pounded into the molds. After setting in the molds a sufficient time,—the clay is in a plastic condition [616] when put into the molds,—after the material stays in the molds a sufficient time to stand of its own weight, enough water has been absorbed by the molds to allow it to stand, the mold is turned over and the stuff is taken out of the mold,—that is, the mold is taken apart and the piece is then finished,—all the seams and rough parts, finger-marks, and things of that sort, are rubbed off after which it is dried and then a superficial coat of clay glazing material is put on and it is sent to the kilns. In the kilns the material is burned in a temperature of about 2,000 degrees Fahrenheit, and this process takes about eight or nine days. When the material is cool enough for handling, the kiln is opened and it is then taken to our fitting department where it is assembled and marked showing the place it is to go corresponding to the places on the drawings for which it is shaped.

(Testimony of M. L. Bryan.)

The first shipment of terra cotta for the Scandinavian-American Bank Building, left the factory September 13, 1920. The first shipment was made on the 17th of September and the last shipment on the 13th day of January, 1921. Thirteen cars of material all told were shipped from the plant to Tacoma. I saw the greater part of it here after it had arrived.

Exhibit No. 130, which I have prepared, is what we call the "key plan" showing the different sets of terra cotta on this building. All that part colored red with red pencil is material that is in Tacoma; that part which is colored yellow, is material that is assembled and ready for shipment at the factory; that part which is colored brown, is material that has been burned and is in our factory but has not been assembled; that part which is not colored, represents material [617] in various stages of manufacture at the plant. The entire quantity of terra cotta covered by our contract, was 24,180 cubic feet; 13,035 cubic feet were shipped; 5,340 cubic feet were manufactured and fitted and is in our shop or sheds at Clayton, Washington. Of the balance of the material, 2,500 cubic feet are burned, but not fitted, ready to be assembled; there are 1,787 cubic feet dressed and treated ready for the glaze to be applied and go to the kilns; 1,266 feet of raw molds, material that molds have been made for; and 252 feet for which molds have not been made but for which drawings are completed.

I have been in the business of manufacturing

(Testimony of M. L. Bryan.)

terra cotta approximately seventeen years and am familiar with its value.

Q. I will ask you to state what the value of the material which was shipped to Tacoma was, according to the contract price?

By Mr. OAKLEY.—I object to that question, irrelevant, incompetent and immaterial. They have got to show under the terms of their contract, which must be introduced here, that there has been a delivery at the plant of the Scandinavian-American Building Company. There has been no such delivery proven or made, in fact. For that reason we object to this question.

Mr. LUND.—That is, of course, a question of fact for your Honor to determine from the evidence.

By the COURT.—If you fail to show delivery, I think it ought to go out. You can get it in in any way you see fit. Objection overruled.

WITNESS.—\$58,657.50.

By Mr. OAKLEY.—That is your first item?

By Mr. LANGHORNE.—Item of material delivered. [618]

WITNESS.—That is 13,035 cubic feet which has been delivered in Tacoma.

Q. Now, what is the value of the material that has been manufactured, fitted and is ready for shipment?

By Mr. OAKLEY.—My objection will run through to all these questions.

By the COURT.—Objection noted, but it will be further considered on argument.

(Testimony of M. L. Bryan.)

The value of the material shipped to Tacoma, according to the contract price, was \$58,657.50; that is 13,035 cubic feet which have been delivered to Tacoma; the next item is material that is burned and not fitted, that is \$10,350.00. The next item is material that has been pressed, \$5,629.05; molds made but not pressed, \$13,010.31; the last item is \$34.02. The figures given represent the reasonable value of the material at the time.

Mr. Sherman Wells, who was superintendent of Construction of the Scandinavian-American Building Company, visited our plant at Clayton about the middle of June, 1920; at that time, some of the material had been manufactured ready for shipment; it was stored outside of our shipping-room in a temporary shed. At that time, Mr. Wells stated that his desire was to assemble all his material for the construction of that building in Tacoma so that he would have no delay in beginning and erecting the terra cotta. He stated he wanted [619] the material at Tacoma so they could have access to it as he needed it. As the material was shipped, a checking list was made for each car of material as it left the factory; we sent a duplicate to the Scandinavian-American Building Company at Tacoma, duplicate copies.

Wells stated he could not take the material at the building; there was no room to store it. That conversation came with Mr. Wells at a later date, regarding a place to store the material. After our first conversation, I discussed with him myself per-

(Testimony of M. L. Bryan.)

sonally on the matter of the delivery of the material in Tacoma, and obtained his permission to do so and our president and myself visited Tacoma in the first week in August, somewhere along the early part of August, and that matter was discussed again with Mr. Wells and Mr. Wells arranged a meeting with a transfer man in town here to discuss the matter of taking care of the material and suggesting a place to store it, which was a shipyard down here. That place was not used. The desire of Mr. Wells was to have the material in Tacoma for his call and he arranged, as I stated, a meeting so that this could be put through. He was pressing that particular point.

In case of breakage, it would be checked and pieces supplied so there would be no delay in taking the terra cotta and using it. The parts that were to be shipped first, were discussed. Mr. Wells desired the third story belt courses first and that he would check it and take care of it. The material was finally placed at the end of the Great Northern freight sheds. We obtained a man who was experienced in the handling and piling of material in the order in which it would be used, and had him on the job taking care of the material as [620] a further check on it. It was not practicable or possible to store this material at the building site; there is not sufficient area there without interfering with the rest of the construction work. Photographs marked Exhibits 131, 132, and 133 represent piles of terra cotta at the end of the Great Northern

(Testimony of M. L. Bryan.)

freight sheds, Tacoma, the terra cotta that was shipped to Tacoma by the company for use in this building. The area required to store that material is in fact larger than the space occupied by the building company. It would not have been possible to carry on the other construction work and take the material at the building.

Cross-examination.

(By Mr. OAKLEY.)

I knew that the point of delivery provided for in the contract was the building site of the building company. Our coast representative selected the site in Tacoma upon which the terra cotta was piled; that is Mr. Clarke, of Seattle. Upon these drawings marked Exhibit 130 all of the red material is on the Pacific Avenue elevation, starting immediately above the granite, the red strip across there. That is not figured in units. There is a belt set across that front, the Pacific Avenue elevation. That is the cornice, the first floor cornice, that one strip. The party line elevation takes up beginning at the roof of the adjoining building up to the top of the first story cornice. The rear or alley elevation called the court "A" elevation from the top or from the dentil court, after the first story up, and included the first story cornice. That would be I would judge about six or eight feet high; that would be the belt course on Pacific Avenue elevation and the Eleventh Street elevation; the granite comes up to the bottom line of the cornice. On the alley elevation, the terra cotta

(Testimony of M. L. Bryan.)

comes clear [621] to the street level. We furnished the terra cotta on the alley side from the level of the street up to the point indicated here that is the material on the alley elevation; that was not altogether satisfactory to the factory. We shipped it over here and we also returned it on finding it did not prove satisfactory. It was shipped here in the last car I think about January 15th; so that the building company could not put up any terra cotta on the alley side until January 13th or after. It would be practical for them to have used it but they did not care to do so. They could have put it at the angle irons and gone on up with it. This material on the first floor above the bank floor was loaded ready for shipment the day of the failure of the bank, That went all around the building except on the party line elevation where the building joins the next building,—the Pacific Avenue elevation. There was one story without any terra cotta; from the first office floor to the top of the windows of the first office floor.

This yellow on the map indicates material ready for shipment but not shipped. The material was ready to ship,—assembled and ready. The same thing prevailed on the Eleventh Street elevation, the first story cornice was delivered.

With reference to that conversation with Mr. Wells, the idea was Mr. Wells wanted the material all here. We started to ship before Mr. Wells,—in other words, we took it from the piles. Our first shipment was taken from the piles prematurely.

(Testimony of M. L. Bryan.)

We moved it to save reloading and to save re-storing, shipped it to Tacoma. That was at Wells' request, not for our own convenience. We were to have the whole amount on the job here. Our representative here in Tacoma was merely to take care of the terra cotta and to look after our interests in [622] the matter. He spent part of his time in Tacoma. I could not say exactly how much. We had several communications from Mr. Wells. I saw the letter marked Exhibit 134 from Mr. Wells, dated November 2, and addressed to our company. (Following is a copy of Exhibit 134:)

On examining the terra cotta that you have stored in the Northern Pacific Railway yards for our building, I notice that you have five distinct colors, while page nine of our specifications states that all terra cotta must be of even color and straight. A few of the pieces connected with the band course are yellow, while other pieces in the same course are white. I have called this matter to the attention of your man who is sorting and taking care of this material at the yard.

I also notice there are a number of snipped pieces and that your man is patching the same. According to our specifications no cracked pieces will be allowed to be placed in the building and I can see no reason for this terra cotta being patched, as you know the patches will all show up with age.

I notice in several places where terra cotta anchors are shown, on the plans, no provision has been made in the terra cotta to receive the anchors,

(Testimony of M. L. Bryan.)

so it will be necessary to punch holes thru the top web of the terra cotta to get the anchors in, and this will all have to be done by your man.

I am calling your attention to these matters before we get to setting so you will have time to make replacements, as I am certain Mr. Webber will not permit this job to go ahead with so many different colors in the terra cotta. Your man here is familiar with all these complaints and he informs me that he is sending you a list of damaged material and bad colors.

Trusting you will give this matter your attention at once, we are,

Very truly yours,

The band course is what we call the belt course, this little projecting course going around the building to sharpen up the surface. The anchor holes were not done, would not be done until such time as it was used on the building to find out just exactly where the anchor holes went. I got such report from our man here. His name is Glazier. I do not believe I have his report referred to in the letter. He has a memorandum of it and I am going to introduce him and show what report he [623] did make and the time we got it. He reported certain pieces broken and others were fractured and they were replaced to a certain extent and others were not. (Exhibit 135 admitted, being letter dated November 4, 1920, from Sherman Wells, Supt. of Scandinavian-American Building Com-

(Testimony of M. L. Bryan.)

panty to Washington Brick, Lime & Sewer Pipe Company.)

We received your full sized drawings of the main cornice and have checked same with Mr. Webber's drawings and find that they are O. K. We are returning them to you to-day and would thank you to acknowledge receipt of same.

When will you be ready to ship the cornice at the first office floor? So far the material you have shipped does not give us enough to start at any particular point and we would be pleased to know when you are going to ship material so that we can start the party line at the second mezzanine floor. I would also like to know when we can expect the material for the Court A elevation starting at the base course. We are setting steel at the first office floor level to-day and expect to move our derricks and put on the next two stories by this time next week. We feel that you have had ample time to get this material ready for us; in fact, it was promised to us before this. We would be pleased to have you advise us as to the exact and true condition of the terra cotta for our job. Very truly yours.

I had no information as to just exactly when that terra cotta referred to was delivered. I know it was made at that time. I knew that Mr. Wells was anxious to get the terra cotta work started and he took it up with me at different times. He first stated that the material he desired on the building was to start at the third floor cornice. That was

(Testimony of M. L. Bryan.)

his first statement, he made that in August a short time previous. At that time, the hanging of the first story cornice was in argument between Mr. Webber and ourselves, as to the method of hanging it, and it was not finally settled as to the space or outlookers until about the middle of August upon the occasion of Mr. Webber's visit to Tacoma. Mr. Wells could start in at the second or third office floor and could have gone up to the ninth floor level before the first of December. These drawings show no particular dates, they are a *resume* of [624] the condition of the job. These originate in our plant and would go to the building to show the men on the building just exactly where all of these sets go. I marked color on there to indicate the stage of completion about the middle of January; I am unable to state positively whether it was before or after the bank was taken over by the State Bank Examiner. This is a matter of reference; a factory has to keep in touch with the job. We keep it on all the jobs. We have done nothing further on this job since that time. We had a certain amount of this shipped, that is shown in red there. I also stated we had 5,340 cubic feet in our factory and in the shed at that time in January; have not manufactured any of the material since. It is exactly in the status it was there, except there has been just such work done as would remove the pieces that were in the way of our operations, moved them out of the way. That part of it is not now in our kilns. There might have been

(Testimony of M. L. Bryan.)

a few pieces in the kiln when Mr. Glenn was over there. There were not fifteen or twenty tons. I do not imagine there would be more than five at the outside. That was last Saturday. We have two or three large jobs in our shop, one of them the University of Washington job, and this Scandinavian-American bank material was in our way, in the way of our operations, and it was necessary to do something with the material. We had no place to store it. It is liable to become a total loss if water should get on the pieces before they are burned so that the question was to move them out of the road and get them in a permanent condition and out of the way. Of the terra cotta to be glazed, there is a total of what is to be made and what is to be pressed and what is on the press shop floor, approximately 110 tons [625] tons yet to be glazed. I would say about 20 tons of this material was glazed after the middle of January. That would be 20 tons off this 110. There were 252 feet for which the molds were to be made yet; 1250 feet were to be pressed and which of course would have to be glazed, and 1787 feet that we were drying. I would say that 20 tons, leaving 90 tons there to be glazed yet. There are 90 tons to be glazed yet to complete the job. That would be approximately 10% of the job. On the 15th of January, 1921, about 5,340 feet was completed for shipment at the plant, and fitted. There was 2,500 cubic feet that was burned but had to be assembled, that is, it had to be laid out, fitted to length and marked. With

(Testimony of M. L. Bryan.)

reference to the expression "molds had been made for," I mean molds that were made but not pressed. [626]

There would be thirty tons of material to get out a certain section or schedule letter, which would be "A," "B," "C" or "D," whatever it happened to be. Thirty tons of material out of molds in that schedule. There may be fifty molds. We may have pressed fifteen tons of that. There would be fifteen tons that was on the pressing shop floor. There would still be about fifteen tons in which the molds are made but not pressed. These molds still have a value. The labor has been expended on thirty tons of material for which we have only had fifteen tons. That one item there is $1/20$, approximately 5% of the entire contract. We have done nothing further with it. As for the last item of 252 feet, the molds have not been made and the drawings have not been delivered. That is of a reasonable value of \$34.02.

Mr. LUND.—We will have a copy of the summary of all tabulations, the figures prepared and filed, and also have the notations made on the blueprint.

WITNESS.—That material that was shipped to Tacoma was consigned to the Local and Long Distance Transfer Co., a Tacoma concern. They took care of the material for the Washington Brick Co., transferring it to the storage yards. We employed them and paid that expense, and I think our company paid the rent on the storage yard.

(Testimony of M. L. Bryan.)

Cross-examination.

(By Mr. METZGER.)

There is 5,340 cubic feet manufactured and fitted in the sheds; that corresponds with the yellow colored portion of the blue-print, and there are 2,500 cubic feet that is burned but unfitted, corresponding to the brown colored [627] portion. The uncolored portions consist of three items, one of 1,780 cubic feet which has been dressed but not glazed; 1,266 cubic feet for which molds have been made but not yet filled or pored; and approximately 250 cubic feet for which only drawings have been made. These last three items are indicated on the blue-prints by the uncolored portions.

Redirect Examination.

(By Mr. LUND.)

The data contained upon the blue-prints and the figures I have given show all the status of the material on or about January 15, 1921. Since that date, in order to get rid of the material that was unfinished, and in our plants, we have done additional work and burned some of the material and moved it into our sheds. If that had not been done, it would be liable to become damaged so as to be useless.

All this material is especially designed for this particular building and has no value whatever for any other purpose. There is no such thing as stock material in terra cotta, that could be used on any other structure. This building was not, at any point, ready to begin the setting of terra cotta. As

(Testimony of M. L. Bryan.)

to why the first office floor material was not here, the first office floor cornice is supported entirely by steel. The spacing of the steel was given to us, or furnished to us but it was an impractical construction as the outlookers were irregularly placed and it would not work out to make a symmetrical joining with the rest of the building. I called the attention of Mr. Webber, the architect, to that fact. We corresponded with Mr. Webber from June until August when he was in Tacoma, and it was settled in August. I saw him here in Tacoma. [628] He admitted our suggestions to be the correct method to do it. We made the suggestions as to how it should be done. In the meantime there was material on the building job under the process of manufacture which made this step back into its turn without setting something else aside. It was a matter of over a month before this could be handled satisfactorily. In the ordinary course of business, approximately 123 days is a good and reasonable time for making large material of that kind. This is a fancy face. The material that we had not a car for shipment to Tacoma when advised that the bank had suspended, was the material immediately above the first floor cornice or that connecting between the red portions shown on here, on this cornice and the red above; that is the matter that Mr. Oakley referred to.

Recross-examination.

(By Mr. METZGER.)

The plans for our work, as originally prepared

(Testimony of M. L. Bryan.)

by Mr. Webber are not inaccurate or improper, but the way it was hung, the state of the yard was such it would destroy the symmetry of the joinings. The architectural effect would have been governed just as much by the joining of the building as it is by other architectural features; in fact it is an important architectural feature. We suggested changes in the architect's methods, and after two months' negotiations, he acquiesced in the changes.

**Testimony of A. G. Fosseen (A. B. Fosseen), for
Washington Brick, Lime & Sewer Pipe Com-
pany.**

A. G. FOSSEEN (A. B. FOSSEEN), a witness called on behalf of the Washington Brick, Lime & Sewer Pipe Co.

Direct Examination.

(By Mr. LUND.)

I am the president of the Washington Brick, Lime & Sewer Pipe Co., a corporation organized under the laws of this state, in 1911, and doing business as a corporation since [629] that time. Its principal place of business is Spokane, Washington. I was president of that corporation in 1919 and 1920. I know the signatures attached to Exhibit 136.

Exhibit 136, being the contract between the Washington Brick, Lime & Sewer Pipe Co. and the Scandinavian-American Building Co., was received in evidence. (Copy attached hereto pp. 47-51.)

We received that contract after February 28th;

(Testimony of A. G. Fosseen.)

to be exact, on the 12th of March. I am familiar with the manufacture of terra cotta in a general way. Terra cotta is manufactured for that particular building according to detailed specifications furnished by the architect after shop drawings have been drafted by our factory, which are drawn according to the architect's plans. I am familiar with the terra cotta that has been manufactured for the Scandinavian-American Bank Building. That material is not suitable for any other purpose than to use in that building except as grog; grog is material that can be reground to put in terra cotta again. It is worth about \$6 or \$8 a ton at the factory.

I executed a notice of lien and caused it to be filed in the Auditor's Office of Pierce County. That is my signature.

Exhibit 137, being the original lien notice of the Washington Brick, Lime & Sewer Pipe Co., is offered and received in evidence. (Copy attached hereto, p. 52.)

I had some conversation with representatives of the Scandinavian-American Building Co. with reference to delivering material at Tacoma under our contract. The first conversation I had was with Mr. Wells, Mr. Webber's representative here in Tacoma, during the month of August, 10th, 11th, 12th and 13th, I think all four of those days I saw him, [630] but just what day I talked with him I do not remember.

(Testimony of A. G. Fosseen.)

Mr. Wells was greatly perturbed over the non-delivery of the steel and he said,—“Mr. Fosseen, you see if these steel deliveries had not delayed us, you would have delayed us—better get busy and get this material here”; Mr. Bryan was here at the time and Mr. Bryan and Mr. Wells spoke to me about the *terra* shipped to this point, saying it would cost no more to ship it over here and unload it than it would to keep it in Spokane, and Mr. Webber said he feared he was going to be delayed on the *terra cotta*—pardon me, I meant Mr. Wells. He said when he had built large buildings in the east, where they knew how to build buildings, he assembled the building on a vacant lot and did not start construction until he had all of his material assembled so that he could rush it up in a hurry. Then later in November I again came over and talked with Mr. Wells trying to get some money out of the bank, and he took me down to the place where they were unloading the *terra cotta* and he said,—“Mr. Fosseen, now rush this *terra cotta* here as fast as you can and I will see that it is taken care of, that it is checked, and you can’t crowd me too fast; I want the material here as fast as I can possibly get it.” Then in December I had another talk with him. He was complaining severely because we had not shipped a member between the granite and the third floor. He had previously agreed to start on the third floor, to set his *terra cotta*, and again he stepped on me and told me to take a personal interest in the delivery of this mate-

(Testimony of A. G. Fosseen.)

rial because they must have it. Mr. Wells told me himself that as the material was received, it was checked by a representative of the building company. The checking consisted of the placement [631] so that it would be easy to move it to the building tier by tier, or story by story. There was \$20,000 paid on our account by the Building Company on August 13th, I think it was, 1920. None of the material had been shipped to Tacoma at that time. The first material was shipped to Tacoma September 17, 1920, and the last was shipped on the 13th of January, 1921. There was another car loaded and ready to be shipped when we got the telephone notice that the bank had failed, and I immediately summoned Mr. Bryan and told him to go over to the factory and have this car unloaded, that we did not wish to ship any more until the status was known. We also had a telegram on the following day, notifying us to stop.

I had nothing personal to do with the arrangement for the site where this material was placed. Mr. Wells suggested that we get the shipyards. He looked that up and stated it was available and that we could get the use of that shop and that it would not cost us very much more than it would to store it at Spokane or the factory at Clayton. That was the state of the conversation every time I saw him, because he had a bugaboo about failure to deliver on account of car shortage, etc. Mr. Wells visited our plant and inspected the material as it was manufactured. He was over there twice that

(Testimony of A. G. Fosseen.)

I know of, I remember distinctly. I know the signature on this Exhibit 138. It is the signature of Frederick Webber, architect and was received by our company in ordinary course of mail.

Exhibit 138, being letter from Frederick Webber to Washington Brick, Lime & Sewer Pipe Co., dated June 5, 1920, received and offered in evidence.
[632]

Your letter of June 1st received. Mr. Wells will gladly make a visit whenever you need him, to your works, and anything that Mr. Wells and you agree upon will be satisfactory to me.

I am pleased to know that you are going go do the best you can for us, but this is nothing new to me, as you impressed me that way when I first met you.

Yours very truly,

Cross-examination.

(By Mr. OAKLEY.)

This instrument we introduced was absolutely the entire contract. There was something accompanying the contract and attached to it and made a part of it. This is the paper evidently because it went out of our office over the signature of our vice-president. The contract itself is signed by our vice-president and Mr. Lund as secretary. We make it a rule not to vary, have everything in the contract. It says it cannot vary the contract, there in the contract itself.

Exhibit 139, paper shown to witness, offered and received in evidence, as follows (letter, dated Feb-

(Testimony of A. G. Fosseen.)

ruary 19, 1920, from Washington Brick, Lime & Sewer Pipe Company to Frederick Webber):

We propose to furnish the Architectural Terra Cotta for the proposed 16-story Scandinavian-American Bank building for the Scandinavian-American Bank Building Company, which it is proposed to erect at Eleventh Street and Pacific Avenue, Tacoma, Washington, for the sum of One Hundred Nine Thousand (\$109,000) Dollars.

This bid covers the exterior facing shown on the plans as Indiana Limestone from the top of that point shown on the plans as 10 cut hammered granite to top of pent house, four sides of building.

It also includes the part on the alley elevation marked as 10 cut hammered granite, as Ashlar Terra Cotta.

We agree to give you free of charges the services of an experienced Terra Cotta setter and fitter.

This price of \$109,000 is for delivery at building site.

We are in position to make deliveries as outlined by you.

Very truly yours, [633]

I had other conversations with Mr. Wells about shipping this material to Tacoma, and wrote this letter to the Scandinavian-American Bank under date of February 5, 1920. That is my signature.

Letter referred to offered and received in evidence as Exhibit 140, as follows:

We are herewith enclosing statement and invoice in triplicate, for Terra Cotta, both shipped and

(Testimony of A. G. Fosseen.)

ready for shipment. You will note at the bottom of the invoice that we have cancelled all former charges so as to make the records more clear. On the statement we show you a credit on August 13 of \$20,000, leaving a balance due and owing to date of \$12,080.50 and we trust that we may receive a check by return mail.

We are ready to make shipment of the 211½ tons and until we get payment for same or until you are ready to receive it at the building, we will not ship same—until either one of these propositions are completed.

However, if you do pay the \$12,080.50 we will do as we have been doing—ship the Terra Cotta and have it go to Tacoma and be ready for you. You can see that this was not in our contract to rent ground space and unload and reload again, but we did that so as to make certain that the car shortage would not delay the delivery of the Terra Cotta.

Trusting that this is satisfactory to you and that you will send us your check for \$12,080.50 by return mail or else provide room at the building site for the Terra Cotta so that we can complete shipment of materials manufactured, we are,

Very truly yours,

Q. Now, that is under date of November 5, 1920? Now, here is what I call your attention to: “However, if you do pay the \$12,080.50, we will do as we have done, ship the terra cotta and have it go to Tacoma and be ready for you. You can see

(Testimony of A. G. Fosseen.)

that this is not in our contract, to rent ground space, unload and reload and we did that so as to make certain that the car shortage would not delay delivery of terra cotta." Was that the reason for shipping that, to get away from having a car shortage and to avoid a failure in delivery? [634]

A. It was with that idea in view and particularly the fact that Mr. Wells wanted it over there, he was cranky, to have this material all assembled that way before he started construction.

The statement in the letter, Exhibit 140, "We did so to make certain that the car shortage would not delay delivery of the terra cotta," was our own thought, possibly. Getting the material over here would be just a question of service. It was on our way and cost us money to come over here. We rented this ground ourselves and paid rent for it, as stated in this letter. This letter was not written at the suggestion of Mr. Wells or anybody connected with the Building Company. I believe these are the statements referred to in that letter. This estimate of \$22,470, Exhibit 141, was material supposed to be delivered in Tacoma, and terra cotta ready to ship, [635] \$20,304.20. We had been paid \$20,000 on August 13; that \$20,000 was paid for material that was over in our Clayton plant. That was paid August 13th and we did not start shipment until September 17th, almost a month after the money was paid. According to the agreement, if they were not ready to receive this material, they were to pay for it,

(Testimony of A. G. Fosseen.)

so I came over here and they paid me \$20,000. Mr. Wells had been there and saw that we had the terra cotta. We had it piled up on the outside and going to additional expense to do that. We were ready. We had about 400 feet of storage space. We have to have a certain amount of fitting and this was blocking the yard and I didn't have enough room in the yard or in the fitting shed or storage shed so I put it outside with a temporary roof over it, and we were ready and anxious to make delivery, and Mr. Wells wanted delivery. My letter there was to force a payment, if I could, from the Building Company.

Mr. Oakley offers in evidence two sheets accompanying the letter of November 5; received in evidence as Exhibit 141. After the suspension of business by the bank here and the Building Company, and after the Receiver had been appointed for the Building Company, we did not continue work under the contract; as the material was in our way, where certain departments had nothing to do, we would allow a little pressing to go on, or if we had a little extra room in our kiln we would put it in there and burn it; as opportunity was afforded, we continued work, looking toward the completion of the material provided for in this contract. I know of no request for delivery of material after the Receivership.

I remember receiving original of the letter signed by [636] Mr. Kelley, dated August 6,

(Testimony of A. G. Fosseen.)

1921, to the Washington Brick, Lime & Sewer Pipe Co.

Whereupon said letter was received in evidence as Exhibit 142, as follows:

After the conference we have had with you with reference to the furnishing of the terra cotta manufactured by you for use in the erection of the Scandinavian-American Building Company's building at Tacoma, Washington; it seems to be impossible to arrive at a satisfactory arrangement for using the terra cotta in the building. You are taking the position that you are the owners of the terra cotta and at the same time pursuing your lien claim against the building for the terra cotta.

We will, therefore, require you to elect whether or not you will deliver this material, for which you claim your lien, to the Receiver without any restrictions on your part, or to dismiss your lien claim and retain possession of your terra cotta.

Will you kindly notify us within the next few days of your decision in this matter so that we may be guided accordingly.

Yours very truly,

This matter was taken up and discussed with our attorneys and other members of the company. I was present at Mr. Haskell's office, the office of the Receiver of this company. Mr. Oakley, Mr. Lund, Mr. Davis and Mr. Kelley were present, present when the conversation referred to in this letter took place at Mr. Haskell's office. I don't

(Testimony of A. G. Fosseen.)

think we refused to recognize the right of the Receiver to have possession of this terra cotta. I don't know that I had to demand or to request. I felt all the time that it was up to the Court's decision. We wanted to have our rights, but we didn't know what our rights were, and we felt it was up to the Court to say what our rights were.

Q. And you would not let the terra cotta out of your possession until the Court determined your rights? A. No. [637]

Q. Didn't you tell Mr. Haskell that you would not consent to that?

A. No, I did not tell him that.

Q. Or Mr. Kelly?

A. I did not tell Mr. Kelly that.

I don't know if I made any response to this letter; possibly you have it in your records. We came to an agreement that we could not see our way clear to offer a proposition that would be acceptable to the gentlemen, and if you had one, we would be willing to consider it. I do not believe I ever made the statement that we would not consent to taking this terra cotta and placing it in place on the building, because I don't know what control I had over it. I felt it was in the Court's possession. I didn't know what to do with it. I thought the Court was going to make an adjudication. I cannot say what I did with reference to this communication of August 6. I don't know whether [638] I have a record of any

(Testimony of A. G. Fosseen.)

letter to our attorneys, Davis & Neal. I have not gone through the letters.

Redirect Examination.

(By Mr. LUND.)

I had been talking with Mr. Haskell as Receiver, or rather as Bank Supervisor, about using the money in the bank or getting authority to do it, to put up this terra cotta. With reference to his statement about asking this State Court for authority to use the bank money to put up this terra cotta, I question whether he said the state Court, but he said it looked good to him; the more he looked at it, the better it looked, and he said he talked to different men around town, and he would see the Court, and afterwards he told me that he had seen the Court and he had put up the proposition to the Court and that he thought he could possibly do business. There was no claim by me of title to this material here in Tacoma. I never claimed title to it after it was shipped over here. Mr. Haskell wanted us to ship the balance of the material, pay the expenses of shipping it over here, putting it on the ground and taking a chance whether we ever got any money out of it or not. We figured out it would cost about \$12,000 to finish up the rest of the material and he wanted us to ship that over and then he told me that he was going to substantiate this lien—this mortgage. If he substantiated this \$600,000 mortgage, our lien would be out, and I said inasmuch as the Court has jurisdiction, we would

(Testimony of A. G. Fosseen.)

have to abide by its decision and await the outcome of that. I could not move. At the same time he told me he was going to contest our lien on the building. He wanted us to go to the expense of \$12,000 or \$15,000 to get the material over here, but he was willing to pay the money. He [639] was going to get authority to pay for the actual expenses of the manufacturing of the rest of the material and the freight. In that conversation I think he did say that he was going to contest our right to lien on this building for the material that was here. This matter of the \$600,000 mortgage was referred to sometime in the early fall. Not the first time we were having these conversations with him with reference to the terra cotta, but at the time Mr. Kelley was present, when Mr. Kelley, Mr. Oakley and Mr. Haskell were together. He may possibly, at that time, have stated that the Bank Supervisor had purchased \$70,000 and was asserting that as the lien, but I was more interested in the \$600,000 mortgage because I felt that the lien owners would be amply protected, that there would be enough money to take care of them even if the \$70,000 mortgage went ahead, but I knew that if the \$600,000 went ahead of the lien, we would be out.

Cross-examination.

(By Mr. HOLT.)

We were paid \$20,000 by the Building Company for terra cotta. As to whether it was a payment for any particular terra cotta, or on general ac-

(Testimony of A. G. Fosseen.)

counts—they were not to pay for that terra cotta or any terra cotta at all until a certain amount was finished and ready for shipment. A certain amount was finished and ready for shipment when we were paid. There was more than \$20,000 worth. I don't know where that terra cotta is. I don't know what became of the terra cotta that was completed, finished and ready for delivery at the time that the \$20,000 was paid. Part of it is the terra cotta here in Tacoma, and probably a part of it is over there yet. I don't know what part of it is still over there at Spokane. I know that it is a part of the terra cotta that is in Tacoma that was collected on. In August terra cotta [640] was made and ready for shipment to the amount of more than \$20,000; we were paid \$20,000.

By Mr. LUND.—This contract was an entire contract for a certain quantity of material, and it is apparent on the face of it that this \$20,000 was paid on account. There is no other claim than that being asserted; under the law it will be treated as the payment on that which was not secured, and lienable against that which is lienable.

By Mr. HOLT.—I understood the witness to say that this \$20,000 was to pay any demand for certain material which had been manufactured.

By Mr. LUND.—Oh, no, no.

By Mr. HOLT.—If that is true, I want to know whether that is the stuff that is here in Tacoma. Now, if it is conceded that this was simply a payment on general account and that it was no

(Testimony of A. G. Fosseen.)

obligation at any time, why, that is another matter.

By Mr. LUND.—That is the fact; I agree that is the fact and it may be stipulated into the record that it was paid on general account and we have applied it on some nonlienable items we have put in there.

Cross-examination (Continued).

(By Mr. HOLT.)

With reference to the Receiver's right to go down and take this stuff from its present location in the City of [641] Tacoma, I thought it was in the Court's hands and I had nothing further to do with it. I could not say anything. I could not have refused, because I did not have the power to refuse. I simply say it was for the Court to say whom it belonged to. I did not claim it; did not deny it; simply said it was for the Court to decide, that was my position. I believed I had no control over it, I could not refuse anything.

Cross-examination.

(By Mr. OAKLEY.)

This statement of August 11 is our statement to the Scandinavian-American Building Co.—statement of the terra cotta under date of August 14, \$26,666.67. You understand we did not consider that as a credit by any means, because it is impossible to segregate terra cotta into certain pieces as you can other clay products or other materials. It is like fabricating steel; you cannot do it, that is, a true estimate of what you think there is there. I cannot tell by this letter

(Testimony of A. G. Fosseen.)

whether that material was shipped to Tacoma or not. Our other man that was here possibly might, I don't know. I don't see how he could. He does not know what that money was paid for.

Statement of August 11, 1920, offered and received in evidence as Exhibit 143, as follows:

Exhibit No. 143.

**WASHINGTON BRICK, LIME & SEWER PIPE
COMPANY.**

**In Account With
SCANDINAVIAN-AMERICAN BUILDING
COMPANY.**

All Terra Cotta of main shaft of building from third story window head to eleventh office floor, burned and being fitted, sills for complete job are finished.

Terra cotta fitted and ready for shipment;

140 tons at \$101.00 per ton\$14,140.00

Terra Cotta burned and being fitted; 160

tons at \$96.00 per ton\$15,360.00

Total\$29,500.00

[642]

As per terms of contract in Article V

75% of \$29,500.00\$22,125.00

This statement is simply an estimate of the amount of work we had done on that job up to that time, as near as I can remember.

Cross-examination.

(By Mr. GRIGGS.)

I say that I have taken the position in reference

(Testimony of A. G. Fosseen.)

to this terra cotta over here, that it was for the Court to say what should be done with it. I think I maintained that all [643] the time to Mr. Haskell. I had nothing to do with it. I told that Mr. Haskell and Mr. Kelley and all the others who discussed the matter with me. I felt this way, that up to the time we would allow them to move—however, I couldn't say that I would or would not, but I felt that if they paid the money for it, we would be willing to have them move it, take the terra cotta and even furnish that over at the factory, going to the extra expense, if they paid all the money. I had no power over it unless they complied with the terms of the contract. All of this material was stored right here at the end of the Great Northern Railroad warehouse. Mr. Wells had the privilege of moving it without an order from me. The terra cotta was over there at his disposal at any time without any payment, without any reservation whatsoever.

Cross-examination.

(By Mr. METZGER.)

We were liable to pay for the loading of it, the transportation of it from the storage yard to the building. We would allow the cost of delivery from the storage yard to the building here at Eleventh and Pacific as a deduction, certainly, or pay for it whatever way they wanted.

Redirect Examination.

(By Mr. LUND.)

Mr. Wells or I had authority to direct the move-

(Testimony of A. G. Fosseen.)

ment of that material to the building. He was over here and we had a representative here and he was absolutely in charge of the movement of that material from that place. It was over here for his convenience and for the bank's. He did not require any authority from us whatsoever to do so.

Recross-examination.

(By Mr. OAKLEY.)

Mr. Wells did not move any of that material to my knowledge. They were not ready for it. We were ready to move it [644] any day and the building was not ready and they had no place to ship it, and we shipped it in here at the extra expense and everything else for their convenience, ready to put it on the ground. We hired space and we had a dray ready to move it to them any time they would demand, but they were demanding that we ship the material, and when we shipped the material they did not have space for it, and then, to make this a real job, make quick delivery, we went to the extra expense of paying for unloading, which is extra, and rented a lot, which is a very small amount.

**Testimony of Willis E. Clark, for Washington
Brick, Lime & Sewer Pipe Company.**

WILLIS E. CLARK, a witness called on behalf of the Washington Brick, Lime & Sewer Pipe Co., testified as follows:

Direct Examination.

(By Mr. LUND.)

I am the coast representative of the Washington Brick, Lime & Sewer Pipe Co. and have been coast representative a little over two years; was such at the time of the contract with the Scandinavian-American Building Co. and was present with Mr. Fosseen when he had an interview with Mr. Larson and Mr. Drury of Tacoma, and something was said about payment for the material and delivery of the material. That was on November 10, 1920, in Mr. Larson's office in the Argonne Building in Tacoma. Mr. Fosseen at that time was asking for additional payments on this contract and Mr. Larson and Mr. Drury stated that they had considered the matter of making additional payments but had decided that they were not able to do so at that time because those sets of terra cotta, some of those sets then in Tacoma were then incomplete and they felt that the incomplete sets should be completed before they made additional payments. I don't recall that they said anything as to the number of sets that were involved. They said [645] that Mr. Wells had reported to them that the sets in question were incomplete; that was in substance what occurred at that time.

(Testimony of Willis E. Clark.)

I was instructed by Mr. Fosseen that it was desirable to make arrangements to handle the terra cotta in Tacoma and that he had had some conversation with Mr. Kellogg, a transfer man, and came to Tacoma and got in touch with Mr. Kellogg and found that he had in mind using a shipyard or a place which had been a shipyard, and Mr. Kellogg secured from the owner a rental proposition with the offer to lease it to us, and Mr. Kellogg also made an offer for handling the material and got in touch with Mr. Fritch of the Local & Long Distance Transfer & Storage Co. and he suggested that the material might be stored in the Great Northern freight sheds as they had a lot of unused room. I took the matter up with the local agent of the Great Northern, Mr. Van Sant, over the telephone, and he stated it was impossible, under the rules governing the railroad, to allow us to use the freight shed; that we could have the use of the vacant ground at the end of the freight shed. After confirming this, I took it up with Mr. Costello, an official of the Great Northern in Seattle and made tentative arrangements with these gentlemen to use it; that is, obtained their permission to use this land, and we received a further offer from Mr. Fritch for handling the terra cotta. That appeared to me more advantageous than the other. I told him we would accept it subject to Mr. Wells' approval. By handling, I mean unloading the cars and piling the terra cotta, and that part of it which could not be delivered promptly to the building, that part of it which they

(Testimony of Willis E. Clark.)

could not receive. I then reported it to Mr. [646] Wells, explaining to him that negotiations had taken place, and asked him if the conclusion of such an arrangement would be satisfactory to him and entirely in accordance with his desires. He stated it would be so and then I made arrangements with the Transfer Company and filed a formal application with the railroad company for the space and they permitted us to use it. I told Mr. Wells of our instructions to Mr. Fritch and that our written memorandum of agreement with Mr. Fritch stipulated he was to deliver the material at the building to Mr. Wells at any time, any material that he might call for. That is substantially all that occurred with reference to it.

Mr. Wells had a man on the ground checking some of the material as it came from the cars. I cannot say when that was, definitely. Mr. Wells had a check according to my memorandum on Great Northern car #208,343. It was being unloaded on December 3d. It may not have been completed or started on that date, but it was being unloaded on that date. I cannot state whether that system applied to all cars shipped subsequent to that time. I was not on the ground, but I do know that he was there, had a man there at the time this car was in.

Cross-examination.

(By Mr. OAKLEY.)

When I said he had somebody there to check the car, I meant he was checking the sheets that were furnished by the factory. These sheets show the

(Testimony of Willis E. Clark.)

numbers corresponding to the parts or the pieces of material. I don't know the man's name who is doing the checking. It was an employee of Mr. Wells or someone acting under his orders. I don't know whether that was the first car that was inspected. I didn't make any note of any other. With reference to this car, a question arose about the misunderstanding between Mr. Wells and Mr. [647] Fritch as to the time they were to start unloading, and it was called to my attention. Mr. Fritch was a transfer man. This question arose with reference to the time they started unloading this car. My impression is that Mr. Fritch told me he had reported to Mr. Wells he would start unloading the car on the morning of December 31st at eight o'clock, and Mr. Wells did not so understand; consequently the inspector did not reach the car until perhaps nine o'clock or a little later in the morning. That is what caused me to make that note. My understanding is the inspector got there about nine o'clock. Several cars had been shipped prior to that date; I could not state how many. I do not know whether the inspection had been made. I was not there. The unloading of it was entirely in the hands of Mr. Fritch. He was there. I was there sometimes when they were unloading, not when this occurred which I speak of. I heard of it from Mr. Fritch, Mr. Wells and Mr. Glazier. Mr. Wells checked some of the material. Mr. Wells and Mr. Glazier and Mr. Fritch each reported, each told me he had a checker on the ground who checked some of the material. I don't know of

(Testimony of Albert Glazier.)

objections by Mr. Wells with reference to the orders of this terra cotta. I never heard of it so far as I can recall.

**Testimony of Albert Glazier, for Washington Brick,
Lime & Sewer Pipe Company.**

ALBERT GLAZIER, a witness called on behalf of the Washington Brick, Lime & Sewer Pipe Co. testified as follows:

Direct Examination.

(By Mr. LUND.)

I am sixty-one years old; have been in terra cotta business for forty-two years; served my time in the business from the ground up, partly in Switzerland and in Boston, Mass.; have been engaged in the manufacture of terra cotta as foreman of the shops and in most of them out here in this Western [648] country, working for different companies; sixteen years in Washington for the Washington Brick & Lime. I live now in Seattle. I had connections with their company last year but am not now employed by them. I am familiar with terra cotta, the way it is made and handled.

With reference to receiving the terra cotta to be used by the Scandinavian-American Building Co., I received checking lists from the transfer company and checked off the material as it arrived here in the yard. Each of those sheets had a letter; the first set was numbered "A"-1 and from there on, up to whatever the number was. There was twenty-seven pieces in that set, and "A"-2 would run from

(Testimony of Albert Glazier.)

there up and would end with 48 or 52 according to the number of pieces in the courses that was on the checking list. I checked off the number of pieces unloaded in the car, and also noted the broken pieces in the car and made a return of it and sent that back to be replaced, to the factory. At the time I received the checking lists there was a duplicate set and one set went to Mr. Wells and the other I kept. Only once or twice Mr. Wells came down and watching, found a piece that did not suit him I made a note of it and had it replaced. There was nobody else to my knowledge besides Mr. Wells, down there at any time, looking at this material. After the car was unloaded, I went up with my checking list to Mr. Wells. Sometimes I went and took a memorandum with me and Mr. Wells' clerk and myself went over a blue-print there and we checked off what was on hand then at the time. He went through their list and he marked it on his; sometimes he used his own checking list and sometimes he used mine, and he marked off the drawings as we went along. [649]

I have made a check of the material that is down here in the yard and I have a list of it here, these papers marked Exhibit 144. This "A," first set of "A" runs from "A"-1 to "A"-54. That set is complete down in the yard except 48 and that piece was broken in the car. I sent a memorandum to the factory for it to be replaced. On set "A"-2 that set also runs to 54 but it is complete. The broken one is not down there. All the other pieces where

(Testimony of Albert Glazier.)

this line runs through is complete. I started on this check of the materials shown on the list on the eighteenth of February and finished it on the twenty-fourth, 1921. There were a couple of piles I repiled down there; put them near the road for better security. The material is piled in rows, designated by letter. A is by itself; B is by itself but not in the numbers as it goes in the building. In the delivery to the building I would take care of that though. The list which I speak of as going with each car was upon such a form as indicated by Exhibit 144. They are printed and made especially for that purpose but in duplicate. One was delivered to Mr. Wells and was a carbon copy of this.

Whereupon said checking sheets were received in evidence and marked Exhibit 144.

I kept a memorandum from time to time of the material that was broken in the cars or that was off color. One time Mr. Wells was down there and found a miter that was a little off color and I made a memorandum of it and it was replaced. I have it here in this book. This book which has been marked Exhibit 145 shows that on September 25 the first car of order 584, Great Northern #121,626. The weight was 65,820. The broken pieces in the car marked as they are on the drawing [650] here and received replacement O. K., and I checked them off as they sent the replacements, after I received the replacements. Here are some I have not received the replacements. The next car was Octo-

(Testimony of Albert Glazier.)

ber 1—the second car, M. K. & T. There were four broken pieces in this car and Mr. Clark O. K.'d them. I had to take it down and show him the pieces. They are lying down there yet. There are little checks after three of these pieces; the fourth I have not received yet; that little check mark indicates that the material was replaced later and is on the ground. That applies to all of the thirteen. That is all I went through. These are not replaced (indicating). Here is a miter that Mr. Wells found off color and that is replaced, "85-C"; this is my check mark. This here is not replaced (indicating).

Whereupon memorandum-book was offered and received in evidence, as Exhibit 145.

With reference to these Exhibits 146 and 147:

In repiling the terra cotta, making my last check, I took three piles. One of them was hanging a little on account of the soft ground. I knew how Mr. Wells was about things. Any cracked pieces, or looking a little cracked or off color I set them to one side and made a list and wrote Mr. Bryan in the shop that in repiling the terra cotta we found pieces that had heavy cool cracks where they were cracked. I set those pieces aside so that they could be replaced by the time Mr. Wells wanted them on the building. These are the broken pieces I have sent to the factory and have not received replacements up to date. That was Exhibit 147. This was made by me between February 18th and 21st at the time I made the general check. Mr. Wells did

(Testimony of Albert Glazier.)

come down there [651] very often when I was checking this material. He came four times to my knowledge.

Cross-examination.

(By Mr. OAKLEY.)

With reference to anybody being there during the unloading of cars, representing Mr. Wells, the clerk of Mr. Wells was down there while I was in Seattle, when a car arrived in Tacoma here and I was at another building in Seattle.

Referring to sheet 3 of this exhibit, that shows "17-A" pieces of material there are those you see marked off; 20 was missing and from 21 up to 40 all missing. There are supposed to be 45 pieces in "21-A," only 9 delivered; "27-A" there are 45 pieces and only 8 delivered. That "27-A" represents one course. The material in "26-A" would not in this case fit in with "27-A." It was the same with "28-A"; there are 45 pieces in that and only some 7 in those 45 delivered. The rest were loaded in the car at Clayton but were not delivered here. They unloaded them again at Clayton. I made this check in February; they were loaded in January. This check was done after everything was over, just for the sake of knowing what was on the ground for sure. The material over there don't look bad. Mr. Wells took one out that was partly discolored and I replaced it and if I had seen any more I would have done it. I came across several pieces in repiling. As a general thing colors were even. Six or seven pieces of them were discolored. The rest of them have a little corner broken off or

(Testimony of Albert Glazier.)

something, and Mr. Wells refused to take anything that was checked. These rejected pieces are lying in front of the piles down there, thrown out as useless. [652]

**Testimony of M. L. Bryan, for Washington Brick,
Lime & Sewer Pipe Company (Recalled).**

M. L. BRYAN, being recalled on behalf of the Washington Brick, Lime & Sewer Pipe Co., testified as follows:

Direct Examination.

(By Mr. LUND.)

With reference to the practice of terra cotta manufacturers in making what is called "overs" in connection with the job, in the manufacture of commercial material, every piece that comes out is not perfect. It is necessary that we make, according to the kind of ware to be made, a certain percentage of overs to take care of losses that occur in the burning process. If there are 500 pieces, we make 2% overs, there will be 10 pieces over. If there would be 4 pieces, we would make 1 piece over, which would be 25% overs. We always make a certain percentage to take care of losses. They are extra pieces of the same character as the ones to be shipped, and the purpose is to take care of breakage in transit and any other defect. That was our practice in this instance. When we received a notice from Mr. Glazier about the broken pieces, we furnished overs for that particular section, those pieces that Mr. Glazier ordered, that is,

(Testimony of M. L. Bryan.)

as near as it was possible to do so. We have at the plant now all of the ones we could not supply from the overs; there were some cases where the breakage on certain classes of stuff was more than our overs so that we had to remake a few to take care of that replacement. We remade the material that Mr. Glazier reported was broken or defective, according to his report. After receiving Mr. Glazier's check here of the material at Tacoma, we compared that check with the blue-print showing our material; there were very few changes necessary to be made. Some points have needed a little bit of checking here and there; we made our blue-print conform to [653] the check so that the blue-print introduced in evidence shows the material according to Mr. Glazier's recheck in February. There are certain parts of the building where the material is interchangeable; that is, the material could be taken from one course and put into another. There are certain typical floors, for instance, material contained in the E, F, G, H, I, J and K, setting letters. I think from E to possibly M, I forget just exactly about it, are in typical stories. I can identify it on the key plan, same height and same width of opening and it is all made from one drawing, all made in the same molds; the fact is, the molds are all lettered as the E and F sections, which are typical floors.

Recross-examination.

(By Mr. OAKLEY.)

As I remember, these went into the building

(Testimony of M. L. Bryan.)

starting at the third story and belt course above that. It is the same as a layer cake, one on top of the other. They are fitted for that place. The drawing is simply for identification, that is all, to see that all the pieces are there. I do not know whether our people checked them out here as they were taken out of the car. They were checked in Spokane into the car. We had a complete check then of everything over there and that check list was forwarded to Tacoma after the car was shipped, to be checked out against the list that we checked them in on. I have not got those lists here. I have made up a memorandum as requested, showing or explaining the key plan.

Whereupon the explanation of the key plan was received in evidence as Exhibit 148. [654]

Exhibit No. 148.

EXHIBIT No. 130.

TERRA COTTA

LEGEND.

Sections colored Red,	Material at Tacoma, G. N. Ry. Yard
“ “ Yellow,	“ fitted ready to ship
“ “ Brown,	“ burned, not fitted
“ uncolored	“ in various stages of making

Status of Terra Cotta Manufacture on Jan. 17th and values at the various stages of making.

		Stage of completion	
Moulds to be made, Drafting done	252 cu. ft.	3%	\$34.02)
“ made, but not pressed	1266 “ “	23%	1,310.31) Un-colored
Pressed & Dried ready for glazing	1787 “ “	70%	5,629.05)
Fitting Dept. (Unfitted)	2500 “ “	92%	10,350.00 Brown
“ “ (Fitted)	5340 “ “	97%	23,309.10 Yellow
Material in G. N. Ry. Yard	13035 “ “		58,657.50 Red
Total cubic feet	24180 “ “		

Case No. —. United States District Court, Western District of Washington. Defendant's Exhibit No. 148. Adm. Oct. 21. Lund. [655]

Testimony of A. B. Fosseen, for Washington Brick, Lime & Sewer Pipe Company (Recalled).

A. B. FOSSEEN, being recalled on behalf of the Washington Brick, Lime & Sewer Pipe Co., testified as follows:

Direct Examination.

(By Mr. LUND.)

With reference to the conversation with Mr. Larson and Mr. Drury at the Tacoma office in November, 1920; I wrote a letter and followed it up by a personal visit regarding collections, and I met Mr. Larson and Mr. Drury in the office in the old Scandinavian-American Bank Building where they were, and told them my position, and they said they would not pay any more money until they had received the terra cotta, starting from the granite base. I said, "Well, when that is finished, will you pay that and pay the rest when it arrives?" Mr. Drury said, "Yes, we will" and Mr. Larson acquiesced.

Testimony of Forbes P. Haskell, Jr., for Washington Brick, Lime & Sewer Pipe Company.

FORBES P. HASKELL, Jr., being called by the Receiver in the matter of the Washington Brick, Lime & Sewer Pipe Company's claim, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am the Receiver for the Scandinavian-American

(Testimony of Forbes P. Haskell, Jr.)

Building Co. I remember a conversation with Mr. Fosseen and his attorneys with reference to the delivery to me as Receiver of the terra cotta involved in this contract that is now before the Court. That was in my office. Mr. Fosseen, at an early date, had consulted me about putting this terra cotta in the building, and gave me this reason that he thought it would help protect the steel, and it would be a great advertisement for his company to have it in the building. So sometime in July or August, I notified Mr. Fosseen I had decided to put the terra cotta in the building, if he was [656] willing to let me take it on the grounds that I had suggested to him, and he came over from Spokane and came to my office with two of his attorneys. I discussed the matter quite at length with them but told Mr. Fosseen that I had decided it would be wise to have the terra cotta in the building providing he was willing to take it under a stipulation that his position in the matter would not be changed, and the discussion fully brought out the fact that Mr. Fosseen and his attorneys had considerable doubt, or had some doubt at least, that their claim would be established on account of the material not having been delivered on the ground or to the Building Company; and after considerable discussion, Mr. Fosseen told me that he would have to refuse to let me have the terra cotta put into the building.

Cross-examination.

(By Mr. LUND.)

I had not, as you know, authority from the Court

(Testimony of Forbes P. Haskell, Jr.)

to put this material into the building. I do not know whether I stated that I had a plan on whereby I was going to use the money in the bank to put this terra cotta up. I presume I wrote Mr. Fossseen, as Receiver of the bank, or as Bank Supervisor, and told him I wanted to talk with him about it. I do not remember particularly, but may have stated in this conversation that I was going to assert a claim of lien under the \$600,000 mortgage, commonly known as the Simpson mortgage. I do not remember that came in; don't think I stated I was going to contest any right of lien of this company. I don't think that I stated that. Don't remember my attorneys stating it, think not. I think my attorneys made the statement at that time that they did not think there was any question but that his lien would stick, something [657] on the basis of the lien being good as to the material unloaded here. I do not remember just how far the conversation went. I don't think they stated in that conversation that before anything could be done with reference to the matter, we would have to get the consent of the other lien holders. Of course we had to get permission of the court to do it. I don't think they said the matter was so involved and complicated that it was impossible to try to deal with the matter, and that it had to be settled by the Court. The matter of the material in Tacoma and the right to lien on it was discussed. Some thought there might be some question and some thought they did not know whether there would be or

(Testimony of Forbes P. Haskell, Jr.)

not. I did not ask Mr. Fosseen if he had any objection to my using the material that was stored here in Tacoma, I was talking about all of the material at Tacoma and at Spokane and all of the material that had to be manufactured. I think I asked Mr. Fosseen if he would expect me to pay the freight on the material over here, and also paying for the manufacture of the original material that had not been finished. As Supervisor of Banking I wrote the letter to Mr. Fosseen, shown me marked Exhibit 149.

Whereupon letter was received in evidence as Exhibit 149, as follows:

I have been giving the matter which you talked to me about a great deal of consideration the last few days. There are one or two questions that have been raised which I would like to be clear on.

If you ship terra cotta here and it is put in the building, will you please advise me what your course will be, whether you expect to file a claim against the receiver or whether you would want to file a lien against the building.

I wish you would also advise me what the approximate amount of the freight would be on the balance of the tile that is at your plant. [658]

I am going into this matter very thoroughly and on every turn I find the suggestion meets with general approval and it is my hope that before very long the way will be revealed to carry out your suggestion.

Very truly yours,

I remember receiving this letter of March 15,

(Testimony of Forbes P. Haskell, Jr.)

1921, I think that is the letter. It was a long time ago.

Whereupon letter of March 15, 1921, Fosseen to Banking Supervisor, was received in evidence as Exhibit 150, as follows:

Your letter of the 12th received and in response to same will say that I am very glad to note that you are seriously considering the suggestion of enclosing the Scandinavian American Bank Building in the near future.

In answer to the questions which you submit, that is, if we ship the Terra Cotta manufactured and at our plant, would we expect to file a claim against the Receiver or would we file a lien against the building, will say it is not our intention to make any claim against you as Receiver.

We, of course, would expect to retain and not in any way prejudice such rights as we already have whether by way of lien or otherwise.

The proposition is this—we will ship the Terra Cotta already manufactured and at our plant, on condition that you pay the freight and other incidental expenses, so that there will not be any outlay on our part.

You may also use the material already in Tacoma paying haulage charges to the building.

We will manufacture the remainder of the Terra Cotta necessary to complete the building on condition that you pay for the manufacturing, fitting, packing, freight and haulage.

(Testimony of Forbes P. Haskell, Jr.)

Our Superintendent estimates these charges as follows: Freight on Terra Cotta manufactured \$3000.00 and \$2000.00 additional to haul it from cars to the building. It will cost approximately \$7000.00 to manufacture, fit and pack the remainder of the Terra Cotta to complete the building.

Under this plan the Terra Cotta would cost you about \$12000.00 and if the lien of your mortgage is held superior to our lien, you are in better position. In the event our lien is held prior, you will no doubt wish to protect the bank's investment and the building properly incased would be a much greater asset.

Moreover, by so doing, you will be preserving the materials on hand, or specially manufactured for the building and protecting the steel frame which is subject to corrosion and rust. [659]

From every viewpoint it would seem to be good business on your part.

It is not our purpose to obtain any added advantage, but protect the interests of all concerned until such time as the courts may determine the rights of the parties. In the meanwhile, the building will be put in safe condition at a minimum cost and producing a revenue.

Unless some plan of settlement is worked out, it is apparent the litigation will be long drawn out before the rights of all parties is judicially determined. If some such plan as I have suggested is not adopted and carried out, whichever party succeeds will have won a barren victory.

When a time comes that you will be interested in

(Testimony of Forbes P. Haskell, Jr.)

an effort to effect a settlement, we will be glad to consider a cash proposition for our claim.

I am firmly convinced that the right thing to do is to enclose the building and our company stands ready to assist in accomplishing this end. We cannot, however, afford to make any further expenditures and I am sure you would not think it good business for us to do so under the conditions.

We trust this makes our position clear and answers your questions and, if not, will be glad to hear from you further.

Yours very truly,

In these negotiations I have forgotten whether I was acting as Receiver of the Building Company or Supervisor of the Bank. I was appointed Receiver. It was after the time I was appointed Supervisor of the Bank and prior to the time [660] I was appointed Receiver of the Building Company; I don't remember when I was appointed Receiver.

Redirect Examination.

(By Mr. OAKLEY.)

The conversation I spoke of in which Mr. Fosseen refused to permit us to take the terra cotta was at a different date from those letters. It was the latter part of the summer I should imagine it was some time in August.

Testimony of D. L. Glenn, for the Receiver.

D. L. GLENN, being called as a witness by the Receiver, having heretofore been duly sworn, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am Assistant Superintendent (of the Building Company). I made an examination of the terra cotta here in Tacoma on quite a number of occasions while the material was being delivered by car to the flats. There was not sufficient terra cotta at any time to make a satisfactory start on the building, so many of the courses were incomplete, so many of the sets; we had contemplated putting in a swinging scaffold entirely around the building to work on. To complete the building at the earliest possible date we intended to start as soon as the steel was riveted and they were out of our way. Within ten days I made an examination of the terra cotta over here in the yard at Tacoma; that is, just superficially. It was all piled up so closely you could not get through it and make an exact examination. From time to time I have made an examination of it. There were quite a number of pieces that are off color. I made that examination for Mr. Wells when this report was written.

Cross-examination.

(By Mr. LUND.)

With reference to selecting out pieces that were

(Testimony of D. L. Glenn.)

off color, separating them, it is not my business to select out [661] the pieces. We just warned the parties at the time and pointed out the pieces, not by number, to Mr. Glazier. I don't know whether those pieces were replaced. I was over at Spokane last week; went up to the plant at Clayton and examined the terra cotta there. I found it in better condition than the terra cotta is here; very good shape. With reference to the terra cotta here having been exposed to the weather and soot getting on it, I can see through the dust and soot. I would not make an estimate of how many pieces are off color over here, an exact estimate, until I would go through it all.

Testimony of Robert M. Davis, for Washington Brick, Lime & Sewer Pipe Company.

ROBERT M. DAVIS, witness called by Washington Brick, Lime & Sewer Pipe Co., testified as follows:

Direct Examination.

(By Mr. LUND.)

I reside at Tacoma and am counsel for the Washington Brick, Lime & Sewer Pipe Co. in this matter. I heard the testimony of Mr. Haskell on last Friday and was present at the conference to which he referred. There was no claim of title made at that time by Mr. Fosseen, President of the Washington Brick, Lime & Sewer Pipe Co. as to the material that has been shipped to Tacoma. Mr. Haskell desired to know whether Mr. Fosseen was

(Testimony of Robert M. Davis.)

going to ship that material over here and Mr. Fosseen replied, and I replied also, that there was a question being raised as to the validity of the lien on the material at Spokane, and that there were other parties raising the question. Mr. Oakley, I think it was, stated that they would not raise the question at that time. I said I understood that was true but that there were other cross-complainants that were disputing and would dispute the validity of the lien on the material at Spokane, and that we did not want to be left in a position of having moved the material over [662] here in the middle of the summer, long after the suit was started, and then have the lien defeated; that he was simply desiring to stand on his rights as they were fixed at the time, and that if arrangements could be arrived at by which we would have no greater or any less rights than we had at that time, Mr. Fosseen was perfectly willing to do it, but there could not be any stipulation arrived at which would bind the other cross-complainants or the other parties to the case. It was agreed by all of us that to obtain the consent of all the parties to the case was practically impossible at that date. Mr. Haskell said he was simply working on a plan—it was more or less tentative at that time, as to whether he could get an order of the Court authorizing the expenditure of the money for the erection of the terra cotta. I don't remember particularly what was said about finishing the material that was then in an unfinished state. I think that would have to be done in order to use the terra cotta that

(Testimony of Robert M. Davis.)

was finished—some slight work that would have to be done. The material that had been shipped to Tacoma was out of the question, practically, no question about the validity of that lien; nothing said by Mr. Haskell or his counsel questioning the right to the lien for that material; Mr. Kelley and I think Mr. Oakley also expressed themselves, stating that they had no question about it in anyone's mind at all. There was no claim made at that time by Mr. Haskell or his counsel that this material here had not been delivered or that they did not have control over it. That was not discussed.

Cross-examination.

(By Mr. OAKLEY.)

With reference to the question of discoloration, cracking, [663] chipping of the material, you state you had been told by somebody there was some discoloration and some cracked material over there but you had not seen it. After the meeting adjourned, Mr. Fosseen and an attorney from Yakima agreed to give you a definite answer as to what we would consent to do with reference to the terra cotta, provided anything could be worked out by which our rights would not be jeopardized. We were willing to deliver, if it could be so arranged that whatever rights we then had would be protected, and brought into court here, and if we had no rights, we did not want to relinquish the terra cotta. I said it would be taken up with the Spokane office. We saw no practical way of working it out by which a stipulation could be arrived at from all the

(Testimony of Robert M. Davis.)

parties, that would save the situation; nothing could be done to change it. We were not in a position of not wanting to part with the terra cotta until the court had decided as to the merits of the case. I had a letter from Mr. Kelley just a little while after this conversation, with reference to the waiving of our rights of lien or delivering the terra cotta. I communicated with my client with reference to the letter. We could not see our way to work out the scheme by which the situation would be saved and our rights would be preserved under just such conditions as they were then. It was not a question of our wanting to retain possession of the terra cotta while we had it, or retaining title. It was a question of relinquishing rights as they then stood. Mr. Haskell was in the position of wanting us to change our position, yet face a contest by him and all these other cross-complainants disputing we had any rights at that time. He wanted to incorporate the [664] terra cotta in the building without giving us any further security than they had. We were still maintaining it would take the court to determine what our rights were at the time the lien was filed, and we saw nothing we could do which would add to or detract from our rights at that time. You and Mr. Kelley and myself all agreed at that time it was impracticable to get a stipulation from all the parties in the lien, particularly preserving whatever rights we had at that time. Mr. Haskell was asking us to be in the position of finishing up whatever work remained to be finished, and sending the

(Testimony of Robert M. Davis.)

stuff over here and then face an attack both by him as Receiver of the Bank and Receiver of the Building Company and by other claimants who deny we ever had any rights. This whole proposition originated some time before that conference; I don't know how it originated. I was not present. I had nothing to do with the letter, Exhibit 150. I didn't know anything about it for months.

Redirect Examination.

(By Mr. LUND.)

When I spoke of relinquishment of the material, I had reference to the material at Spokane; this material here was not in question at any time. The reference was entirely to the material at Spokane.

Testimony of Guy E. Kelley, for the Receiver.

GUY E. KELLEY, being called by the receiver, testified as follows:

Direct Examination.

(By Mr. OAKLEY.)

I am an attorney for the Receiver in this case. I remember the conversation I had with Mr. Fosseen, Mr. Davis and Mr. Haskell and other parties with reference to obtaining permission that the terra cotta be put into the Scandinavian-American Bank Building. There was no distinction made with reference to the terra cotta in Tacoma and the terra cotta [665] in Spokane, as to whether or not there had been a delivery. It was all discussed as one proposition; they were never divided. My letter of August 6 is based upon the same theory.

(Testimony of Guy E. Kelley.)

Cross-examination.

(By Mr. DAVIS.)

I told you we were not questioning at that time the priority of your lien. They told me that Mr. Holt was fighting your whole lien on the grounds there had been no delivery and you suggested Mr. Lund at Spokane had looked into the matter and claimed all material was shipped, constructed for a building as all of this material was, that it did not need to be completed, that lien was maintained just the same. I told you we had not looked into the matter. My personal opinion was that you did not have a lien but that generally there seemed to be an opinion among the attorneys that you did have a lien under certain circumstances. I admitted also at that time that I did not know the attitude of various of these other cross-complainants and did not know what attitude they would take with reference to the matter. You told me there was a serious question to be raised by Mr. Holt as to the validity of the lien. He is only one that I remember you mentioned.

Cross-examination.

(By Mr. LANGHORNE.)

With reference to the statement that there was some opinion among the other attorneys that there was a lien as to materials that were specially prepared for a building but not delivered, Mr. Davis said some other attorneys had been consulting on this same point. I think a man from Yakima and some attorney from Seattle had been consulted in the

(Testimony of Guy E. Kelley.)

matter. He did not refer to any other attorney in this case. Mr. Luman was one of the attorneys and he was one of those [666] present at the conference.

Whereupon it was stipulated by Mr. Oakley, attorney for the Receiver, and Mr. Lund for the Washington Brick, Lime & Sewer Pipe Co. that the following extract from the specifications should be put into the record:

“All terra cotta must be straight and even and made according to the details hereinafter approved by the architect; same to be made by terra cotta contractor. Models must be submitted to the architect for approval before starting work. No cracked pieces will be allowed to be placed in building; and all terra cotta must be of even color and straight; no bent pieces to be allowed.” [667]

**Testimony of P. C. Sullivan, for Washington
Brick, Lime & Sewer Pipe Company.**

P. C. SULLIVAN, a witness sworn on behalf of the Washington Brick, Lime & Sewer Pipe Co., testified as follows:

Direct Examination.

(By Mr. DAVIS.)

I am an attorney practicing law in the city of Tacoma, admitted to practice in the United States District Court for the Western District of Washington; I have practiced in that court about thirty years I guess, ever since it was organized, and longer

(Testimony of P. C. Sullivan.)

than that in the courts of the state, five years more; my practice has been miscellaneous practice, all classes; I have handled litigation involving mortgage and bond foreclosures and mechanics' lien cases.

I have familiarized myself, in a general way, with the work in connection with the claim of the Washington Brick, Lime & Sewer Pipe Company in this case, which concerns the contract with the Scandinavian-American Building Company for the fabrication of terra cotta. In the event that the Company's claim for lien is sustained for the amount of material delivered here in Tacoma, approximately \$58,000.00, I should think a reasonable attorney's fee would be about \$5,800.00, or ten per cent of the amount of the recovery. If the amounts should go less than \$40,000.00, I think the attorneys ought to have \$4,000.00 as reasonable fees, providing the amount allowed is above \$20,000.00.

**Testimony of Scott Henderson, for Washington
Brick, Lime & Sewer Pipe Company.**

SCOTT HENDERSON, a witness sworn on behalf of the Washington Brick, Lime & Sewer Pipe Co., testified as follows:

Direct Examination.

(By Mr. DAVIS.)

I am an attorney practicing law in the city of Tacoma, Washington, and practice in the Federal Court and in the State Court, have been practicing in the state of Washington ten years and I am fa-

(Testimony of Scott Henderson.)

miliar with the service necessary and the [668] compensation adequate for mortgage and lien foreclosures.

I am familiar, in a general way, with the legal service in connection with the Washington Brick, Lime & Sewer Pipe Company's claim in this case; I would say that \$6,500.00 would be a reasonable fee in that case, on the assumption that while the lien was filed for \$84,000.00 or \$85,000.00, the amount that is insisted upon now, of material delivered is \$58,000.00. I have looked into the work that was necessary and have considered this case as entirely different from the ordinary case of the filing and foreclosing of a lien, and taken into consideration the amount of work necessary to establish it and the hazards involved. [669]

Exhibit No. 136.

CONTRACT.

THIS AGREEMENT, made this 28th day of February, A. D. 1920, by and between Scandinavian-American Building Company, a corporation, hereinafter called the "Owner," party of the first part, and Washington Brick, Lime and Sewer Pipe Company, a corporation organized and existing under the laws of the State of Washington, hereinafter called the "Contractor," party of the second part.

WITNESSETH:

WHEREAS, the said Scandinavian-American Building Company, Owner, is about to begin the erection of a sixteen-story building on the property

situated in Pierce County, Washington, described as follows: Lots Ten (10), Eleven (11) and Twelve (12) in Block One Thousand Three (1003), as shown and designated upon a certain plat entitled "Map of New Tacoma, W. T.," of record in the office of the Auditor of Pierce County, Washington, according to plans and specifications prepared by Frederick Webber, of Philadelphia, Penn., architect, and

WHEREAS, the said Washington Brick, Lime & Sewer Pipe Company is desirous of entering into a contract with the said Scandinavian-American Building Company, Owner, to furnish all the terra cotta above the dentil course over the back and two sides, being 11th and Pacific Avenue, the alley side to run to the granite base; the rear to run down to the wall of the adjoining building, according to estimate of February 19th, 1920, attached hereto; under and subject to all terms, limitations and conditions contained in the plans and specifications hereinbefore referred to.

NOW THIS AGREEMENT WITNESSETH,

ART. I. That in consideration of the agreements herein contained, the Owner agrees to pay to the Contractor, the sum of One Hundred Nine Thousand (\$109,000.00) in installments as hereinafter stated, Said payments, however, in no way lessening the total and final responsibility of the Contractor. No payment shall be construed or considered as an acceptance of any defective work or improper material.

Although it is distinctly understood and agreed by and between the parties hereto that this con-

tract is a whole contract, and not severable or divisible, yet for the convenience of the Contractor, it is stipulated that payments shall be made as follows:

75% monthly, to be paid in cash, of the estimated value of material delivered, and the balance of 25% to be paid within thirty (30) to sixty (60) days from the completion of this contract.

ART. II. The said Contractor hereby covenants, promises and agrees to do all of the aforesaid work to be furnished and finished agreeably to the satisfaction, approval and acceptance of the Architect of said building and to the satisfaction, approval and acceptance of the said Owner, according to the true intent and meaning of the drawings, plans [670] and specifications made by said Architect,

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which said plans, drawings and specifications are to be considered as part and parcel of this agreement, as fully as if they were at length herein set forth, and the said Contractor is to include and do all necessary work under his contract, not particularly specified, but required to be furnished and done in order to fully complete and fulfill his contract to the satisfaction of the said Architect and Owner aforesaid.

ART. III. The Contractor hereby agrees that time shall be considered the very essence of this contract and to complete all the obligations herein assumed, and to enter into the spirit of co-operation under which all the Contractors are working. And the said Contractor further covenants and agrees to perform the work promptly, without no-

tice on the part of anyone, so as to complete the building at the earliest possible moment.

ART. IV. The Contractor further covenants and agrees to observe carefully the progress of the work upon the entire building, without notice from anyone, and to procure drawings at least two weeks prior to executing the work, and to perform his portion of the work upon said building at the earliest proper time for such work, and to be responsible for all loss occasioned directly and indirectly by any lack of knowledge upon his part, as to the proper time to perform his work.

ART. V. The said Contractor shall complete the several portions and the whole of the work comprehended under this agreement by and at the time or times hereinafter stated, viz.:

Delivery of the aforementioned material to commence within four (4) months from the date of this contract, and to be completed within six (6) months.

Should the contractor be delayed in delivering his material, by the owner, certificates are to be given for payment for material completed at the factory.

ART VI½. The Purchaser shall furnish to the Manufacturer such further drawings or explanations as either party may consider necessary to detail and illustrate the work to be made, and the manufacturer shall conform thereto as part of this contract so far as the same may be consistent with the original drawings and specifications hereinbefore referred to and with the technical possibilities of the material.

ART. VI. Should the Contractor be delayed in the progress of the work under this contract by strike, or common carrier, or casualty wholly beyond the control of the Contractor, then the time herein designated for the completion of said work shall be extended for a period equivalent to the time lost, but no such allowance shall be made unless a claim therefor is presented in writing by the Contractor within twenty-four hours of the occurrence of such delay. [671]

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ART. VII. And in case of default in any part of the said work within the time and periods above specified, the Contractr hereby promises and agrees to pay the Owner, and the Owner may deduct from any amount coming to the Contractor the sum of Fifty (\$50) Dollars for each and every day's delay until the completion of the work, not in the nature of a penalty, but in the nature of liquidated damages for the delay caused to the Owner in the completion of the work.

ART. VIII. Any imperfect workmanship or other faults which may appear within one year after the completion of said work, and in the judgment of said Architect arising out of improper materials or workmanship, shall upon the direction of said Architect, be amended and made good by, and at the expense of, said Contractor, and in case of default so to do, the Owner may recover from said Contractor the cost of making good the work.

ART. IX. The Contractor hereby agrees to remove the dirt and rubbish accumulating on the

premises, caused by the construction of his work, at such time or times as he may be instructed by the Owner or his representatives, and if not removed promptly by the Contractor, the Owner is hereby authorized to remove the same at the expense of the said Contractor, and to deduct the cost thereof from any balance that may be due and owing him.

ART. X. And should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or materials of the proper quality or fail in any respect to prosecute the work with promptness and diligence or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect or the Owner, the latter shall be at liberty after two day's written notice to the Contractor to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this Contract; and if the Architect or the Owner shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon and to employ any other person or persons to finish the work and provide the materials therefor; and in case of such discontinuance of the employment of the Contractor, the latter shall not

be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work said excess shall be paid by the Owner to the Contractor; but if said expenses shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expenses incurred by the Owner as herein provided, either for furnishing the materials or for finishing the work and any damages incurred through such default shall be itemized and certified by the Owner, which itemized statement shall be conclusive upon the Contractor. [672]

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ART. XI. And the Owner reserves the right, that if there be any omission or neglect on the part of the said Contractor of the requirements of this agreement and the drawings, plans and specification, the said Owner may, at its discretion, declare this contract, or any portion thereof, forfeited; which declaration and forfeiture shall exonerate, free, and discharge the said Owner from any and all obligations and liabilities arising under this contract, the same as if this agreement had never been made; and any amount due the Contractor by reason of work done or material furnished prior to the forfeiture of this contract, shall be retained by the said Owner until the full completion and acceptance of the building upon which said work has been done or said materials furnished, at which time

the said Owner, after deducting all costs and expenses occasioned by the default of the said Contractor, shall pay or cause to be paid to him the balance with a statement of all said costs and expenses.

ART. XII. And the Contractor further covenants, promises and agrees that he will make no charge for any extra work performed or materials furnished in and about his contract, and he hereby expressly waives all right to any such compensation, unless he shall first receive an order in writing for the same from the Owner.

ART. XIII. And the Contractor hereby assumes entire responsibility and liability in and for any damage to persons or property during the fulfillment of this contract, caused directly or indirectly by the Contractor, his agents or employees, and the Contractor agrees at his own expense to carry sufficient liability and workman's compensation insurance and to enter in and defend the Owner against, and save it harmless from loss or annoyance by reason of suits or claims of any kind on account of such alleged or actual damages; or on account of alleged or actual infringements of patents in regard to any method, device or apparatus, or any part thereof, put in, under, or in connection with this contract, or used in fulfilling the same.

The Contractor hereby further agrees not to assign or sublet in any manner whatsoever, any part or portion of this contract, without the written consent of the Owner, upon the express penalty of

forfeiture of the entire contract, in the discretion of the Owner.

ART. XV. And the Contractor shall at all times, when required by the Owner, before receiving any moneys under this contract, produce satisfactory vouchers and receipts from all employees and materialmen for work done and materials furnished in and about the erection and completion of the building covered by this contract.

ART. XVI. And any and all work that may be cut out and omitted from this contract, during the progress of the work, shall be allowed by the Contractor at the regular contract price, and shall be adjusted and agreed upon by said parties before the final settlement of their accounts. [673]

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ART. XVII. The Owner shall not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said work, or any part thereof, or to any of the materials or other things done, furnished and supplied by the Contractor, used and employed in finishing and completing the same.

ART. XVIII. It is hereby further mutually covenanted, promised and agreed, by and between the said parties, that in the event of any dispute or disagreement hereafter arising between them as to the character, style or portion of the work on said buildings to be done, or materials to be furnished under this contract, or the plans and specifications hereinbefore referred to, or any other matter in connection therewith, the same shall be referred to

three arbitrators, one to be chosen by each of the parties hereto, and the third by the two arbitrators so selected, whose decision, or that of the majority of them in the matter, shall be final and binding upon them.

ART. XIX. The Contractor shall, upon request from the Owner, furnish forthwith a bond or bonds in form and substance and with surety satisfactory to the Owner, in the sum of Fifty-four Thousand (\$54,000.00) Dollars conditioned for the true and faithful performance of this contract on the part of the Contractor. The Bond, however, to be paid for by Owner.

ART. XX. All negotiations and agreements, oral or written, prior to this agreement, are merged herein and there are no understandings or agreements, verbal, written or otherwise, between the said parties except as herein set forth. This agreement cannot be changed, altered or modified in any respect except by the mutual consent of the parties endorsed hereon in writing and duly executed.

The Contractor has read and fully understands this agreement and the said Contractor hereby certifies that before the execution of this agreement he examined all the plans and specifications prepared in connection with the contract.

And it is further agreed that the covenants, promises and agreements herein contained shall be binding upon and final upon the heirs, executors, administrators and successors of the parties hereto.

IN WITNESS WHEREOF, the said parties

have hereunto set their hands and seals the day
and year first above written.

Signed, sealed and delivered in the presence of
SCANDINAVIAN-AMERICAN BUILD-
ING COMPANY.

[Seal]

By CHARLES DRURY,
Its President.
J. SHELDON,
Its Secretary.

WASHINGTON BRICK, LIME & SEWER
PIPE COMPANY,

Contractor.

By V. E. PIOLLET,
Vice-president.

CHARLES P. LUND,

Secretary. [674] 113

